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IN THE

Supreme Court of the United States

KENNETH J. GRAHAM,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prosecution's duty-to-discover, under this Court's holding in *Kyles v. Whitley*, 514 U.S. 419 (1995), extends to its cooperating witness, who possesses exculpatory information, because a limitation of the prosecution's duty-to-discover to only police officers and government agents is contrary to the prosecutor's obligations under the Due Process Clause of the Fifth Amendment, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny?

PARTIES TO THE PROCEEDINGS

Petitioner Kenneth J. Graham was a defendant and an appellant below. Kyle Dresbach, represented by separate counsel, was also a defendant and an appellant below. We have been advised that Mr. Dresbach will file a separate petition for certiorari seeking review of the decision below.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth J. Graham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit affirming the District Court's judgment of conviction and sentence is reported at 484 F.3d 413 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court denying Mr. Graham's motion for new trial is unreported and is reprinted at App. 23a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 2007. App. 1a. A timely petition for rehearing en banc was denied on September 18, 2007. App. 53a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

1. Introduction

In this case, the government's theory was that Thyssen, Inc., N.A. (hereafter "Thyssen"), a steel processing company headquartered in Detroit, Michigan, was defrauded of $6.5 million dollars in that petitioner Kenneth J. Graham (former Thyssen CEO), co-defendant Kyle Dresbach (former Thyssen Executive Vice-President), and un-indicted cooperating informant and co-conspirator Jerome Allen (former attorney and advisor for Mr. Graham for over thirty years) caused Thyssen to enter into agreements to purchase equipment at fraudulently inflated prices. As a result, these inflated prices produced higher commissions for an equipment broker (Robert Murdoch of Hurricane Machine), who then paid the excess com-

missions, as well as monies obtained from Thyssen for fictitious consulting fees, to shell entities created by Allen. Allen converted the monies for his own use, wrote checks to Mr. Graham and Dresbach, concealed the money through use of his client trust accounts, and filed tax returns for Mr. Graham which did not report the proceeds of the scheme as income.

The two determinative issues in the case, as to Mr. Graham, were (1) whether the payments he received from Allen, the government's cooperating witness and spokesman for its theory, were the fruits of the alleged scheme to defraud or were, as Mr. Graham contended, repayment of past monies he had loaned to Allen and (2) whether, as Mr. Graham contended, he had other non-taxable available sources of cash, including cash from the 1970's and 1980's, which he used for the cash payments he made in 1997 and 1998. At the time of the trial, Mr. Graham did not have any of his documents which would substantiate either the loans or his other sources of cash because Allen had maintained possession of Mr. Graham's personal, financial, and legal records throughout their thirty-year attorney-client relationship and, presumably, as Mr. Graham believed and as Allen testified, these decades-old documents had been destroyed.

2. The district court proceedings

In May, 2003, Mr. Graham and Kyle Dresbach were charged with conspiracy to commit mail fraud and file false tax returns, conspiracy to commit money laundering, money laundering, and subscribing false tax returns—all in violation of 18 U.S.C. §§ 371, 1956(h), 1957, and 2 and 26 U.S.C. § 7206(1), respectively.

Well over a year before the trial, which began in July, 2004, Mr. Graham's attorneys had demanded that Allen produce all of Mr. Graham's documents. Allen confirmed this fact during his trial cross-examination. In response to this demand, Allen had provided Mr. Graham's attorneys with five boxes of files and represented that these boxes consisted of **all** the Graham documents he possessed.

Prior to the opening statements at trial, Mr. Graham moved to dismiss the indictment based on new information just revealed in the prosecutor's notes of a March 15, 2004 interview of Allen. The prosecutor's notes read: "Haven't turned over old files, 1980's, to Graham's attorney. We want to review them first." App. 4a. Mr. Graham's counsel argued that transactions from the 1970's, 1980's and 1990's were the crux of the defense and that, on their face, the March 15, 2004 notes showed that Mr. Graham's "old files" had been withheld from the defense and that the prosecutor not only knew about the documents, but wanted to review them "first." Relying on the prosecution's representation that it had already given the defense all the records it had, the district court denied the motion.

At the trial, Allen testified to a scheme of receiving and distributing the Hurricane Machine proceeds among the three alleged co-conspirators. Contrary to Mr. Graham's contention, Allen stated that there were no loans to him by Mr. Graham. Allen described how he had produced five boxes of Mr. Graham's records to defense counsel, but had destroyed the rest of the records he had accumulated over his thirty-year representation of Mr. Graham.

Allen also testified that, beginning in the late summer of 2002, he was covertly providing information to the prosecutor and agents about his client Mr. Graham. At the same time, Allen was continuing to represent Mr. Graham as his trusted lawyer, tax advisor, and fiduciary. The evidence at trial established that while Allen was cooperating with the prosecutor, he was providing documents and leads about Mr. Graham's financial affairs. During this time, Allen traveled with Mr. Graham to Scotland, set up his business entities there, stayed in his house, provided tax advice, prepared his tax filings and rendered legal advice to him while simultaneously providing information about Mr. Graham to the prosecutor.

Mr. Graham's defense to the charges was two-fold: (1) that he had made loans to Allen in the late 1980's that Allen repaid by paying part of Mr. Graham's personal expenses over time; and (2) that he had acquired monies in previous years so as to have sources of cash, other than reportable income earned in 1997 and 1998, sufficient to satisfy the alleged cash payments made in those years.

Mr. Graham testified that he had loaned Allen (whom he trusted as his attorney for over thirty years) approximately $550,000 at an interest rate of ten percent from 1987 through 1991. Mr. Graham acknowledged that he had no records documenting the total amount loaned because it was Allen who had always kept all of his records. Mr. Graham also testified about accumulating cash, beginning in 1976, initially from the sale of his interest in a steel company and later from his interest in Thyssen, and that the money ($475,000) was deposited in a bank account Thyssen opened for him at Commerzbank in

Germany. Mr. Graham recounted that in his work for Thyssen he traveled to Europe twenty to twenty-five times a year, and that on many of those trips he returned with cash from his German bank account—approximately $650,000 to $700,000 dollars (the amount of the original deposit plus accumulated interest) from his Commerzbank account. Further, Mr. Graham testified about cash received from the sale of furnishings in his homes sold in the 1980's. In total, Mr. Graham testified about cash sources available to him since 1976 in the amount of approximately $1,362,000.

In the middle of Mr. Graham's direct examination, the prosecution notified defense counsel that Allen had just produced four early 1990's promissory notes evidencing $200,000 owed by Allen to Mr. Graham's wife. The defense moved for mistrial, arguing that for the three weeks of trial preceding this revelation, the defense strategy was necessarily based on the now incorrect belief that there were no documents currently existing that could evidence loans to Allen, and that, had this information not been suppressed, the entire defense strategy would have been completely different, starting from the defense opening statement and including the fact that neither Mr. Graham nor Mrs. Graham would have had to testify. During the hearing on the motion, the prosecution revealed that Allen also had just produced nine years (1974 through 1982) of Mr. Graham's tax returns, in response to the prosecution's request of Allen after Mr. Graham's testimony on the prior day. It was then disclosed, for the first time, that the folder containing the promissory notes came from what was said to be a single box of Graham documents never disclosed, nor provided, to the defense. The district court ordered an adjournment to permit defense counsel time

over the weekend to review the box of records for other exculpatory evidence.

Following the weekend, when the trial recommenced, defense counsel informed the district court that it was not only just one box that had been withheld; rather, there were in fact fifteen boxes of Graham documents which had just been produced by Allen. Due to the disorganization and volume (in excess of 40,000 pages) of these boxes, defense counsel submitted that it was impossible to substantively review these documents over the weekend time period permitted by the district court. The defense renewed the motion for mistrial, specifically adding that this suppression amounted to a violation of Mr. Graham's right to due process. In response, the prosecution argued, alternatively, that 1) it was not aware of these records prior to this point; 2) the documents were irrelevant because they referred only to the 1980's and 1970's and not 1994 through 2001 (the period for which they subpoenaed Allen); and 3) because Mr. Graham had testified about earning substantial monies in the 1970's and 1980's and, in order to prepare for cross-examination, they had merely asked Allen if he had any of Mr. Graham's tax returns going back to 1974. The district court then denied the defense motions, but noted that the defense could move for a new trial (in the event of a conviction) if exculpatory material was later discovered in the boxes.

When the cross-examination of Mr. Graham began, the prosecutor challenged Mr. Graham about his lack of documentation for his claims, including, to use the prosecutor's words, the "so-called German bank account." Mr. Graham responded that Allen had had

all of his records, but that he understood from Allen that all the records had been destroyed.

Following Mr. Graham's testimony, the defense called Allen to the stand to examine his failure to disclose the promissory notes and the fifteen boxes before trial. Allen testified that he had discovered that he possessed these boxes labeled "Graham" more than a month before the trial and that he thought he had informed the prosecutor of the existence of the boxes of documents.

The prosecutor chose to ignore Allen's testimony about the disclosure of the boxes, and in his closing, argued to the jury that it should not believe Mr. Graham because he had no documentation of any loans or non-taxable sources of cash. The prosecutor repeatedly referred to Mr. Graham's testimony about the $1.3 million cash accumulated over the years in the late 1970's and 1980's as both "a story" and "a fiction" and repeatedly characterized Mr. Graham's claim about the cash as "fantastic." App. 19a.

Mr. Graham was found guilty. Subsequently, he moved for a new trial, arguing that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce the key exculpatory evidence in the fifteen boxes sooner and that the suppression of the documents during trial compromised his Sixth Amendment right to confront the witnesses against him and his Fifth Amendment right to due process and a fair trial. In his motion for new trial, Mr. Graham presented the results of his counsel's post-trial review of the fifteen boxes. Specifically, Mr. Graham had found exculpatory evidence of non-taxable sources of cash, together with proof of his ability to fund loans to

Allen that, if available, would have established his defense.[1]

The district court heard oral argument on the motion, without an evidentiary hearing. The district court denied the motion, concluding that it was Allen, not the prosecution, who suppressed this evidence and therefore Mr. Graham was not entitled to a new trial under *Brady* or Rule 33, Fed. R. Crim. P. App. 51a.

In August, 2005, the district court sentenced Mr. Graham to a total term of imprisonment for 75 months and ordered his bond continued on appeal. Thereafter, Mr. Graham appealed.

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[1] Examples of the *Brady* material, contained in the boxes, were the original records from Commerzbank in Duesseldorf, Germany establishing that, at least between 1979 and 1980, Thyssen directly deposited hundreds of thousands of dollars into accounts in Mr. Graham's name. These deposits and/or account balances were approximately $267,000, $124,000 and $200,000 in U.S. funds and earned varying interest at rates between 12.125%, 14% and 18.37% during that time period. Most importantly, these records would have negated the prosecutor's arguments that such deposits never existed and that Thyssen never paid any monies to Mr. Graham in Germany. Further, there was a handwritten draft of a letter to a Thyssen executive in Germany, substantiating Mr. Graham's claim that he had a 10% stake in profits and that he received payment of such as compensation in Germany. Additionally, there was evidence that contradicted the prosecutor's suggestion, in his cross-examination of Mr. Graham, that it was incredible that Mr. Graham would sign financial statements without reading them. In contrast to the adverse implication in the prosecutor's questions, there were numerous financial statements and credit applications signed in blank by both Mr. and Mrs. Graham in the fifteen boxes held by Allen.

3. The court of appeals' decision

On appeal, a divided panel of the Sixth Circuit held that "the cooperating witness here was not acting on behalf of the government" and affirmed Mr. Graham's conviction. App. 3a. The majority, in its opinion, acknowledged the prosecutor's duty under *Brady* and *Kyles*, but stated that:

> [C]ooperating witnesses such as Allen stand in a very different position in relation to the prosecution than do police officers and other government agents. The Supreme Court in this regard relied directly on the fact that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will." [*Kyles v. Whitley*, 514 U.S. 419, 438 (1995)] That is not necessarily the case with regard to cooperating witnesses, as the circumstances of this case demonstrate.

App. 8a.

Judge Batchelder dissented. She disagreed with the majority and the district court's reading a "limitation" into the prosecutor's duty in *Kyles*, and stated, in pertinent part:

> Ultimately, the district court reasoned that the prosecution's duty-to-discover under *Kyles* is only applicable to police officers and government agents, and does not extend to cooperating witnesses such as Allen, i.e., "snitches." *I disagree with this reading of Kyles, which states: "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. In my view, this language is inclusive, not exclusive, and at least implies that the duty begins rather than ends with the police.* The limitation to police is particularly suspicious in this case where Allen,

> while continuing to represent the defendants as lawyer, fiduciary, and tax advisor . . . was covertly providing information to the government in accordance with his plea and cooperation agreement, and was providing documents to the government prosecutor, while those exculpatory files—which were actually Graham's property—sat, unbeknownst to Graham, in Allen's garage.
>
> The prosecution should not be allowed to cherry-pick the incriminating evidence out of a cooperating witness's files and leave the rest, only to hide behind the assertion, when challenged, that it never had actual possession of those (exculpatory) files and therefore had no obligation to provide them to the defense. . . . *Brady* is intended to ensure that the defendant gets the same evidence that is available to the prosecution. That is why the government must pursue it and provide it, even if the defendant does not specifically ask for it. By failing to construe the rule as a guarantee of fairness, the district court improperly limited *Brady*, *Strickler*, and *Kyles*.

App. 20-22 a (emphasis added).

Mr. Graham filed a timely petition for rehearing en banc, which was denied on September 18, 2007; the order denying the rehearing en banc noted that "Judge Batchelder would grant rehearing for the reasons stated in her dissent." App. 53a.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Petition To Clarify The Scope Of The Prosecutor's Duty-To-Discover Under *Kyles v. Whitley*, 514 U.S. 419 (1995)

A. The Decision Below Conflicts With This Court's Precedents By Sanctioning A Limitation On The Scope Of This Court's Holding In *Kyles*, Thereby Permitting The Prosecution To Violate Its Obligations Under The Due Process Clause And *Brady v. Maryland*

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Sixth Circuit decision in this case conflicts with this Court's long history of precedents establishing the scope of the prosecutor's duty-to-discover. The Court should grant the petition to resolve this conflict.

1. *Brady* And Its Progeny

Beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), this Court established a constitutional duty and obligation under the Due Process Clause on the part of prosecutors to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

In *Brady*, the prosecutor failed to disclose the statement of Brady's companion, who had admitted strangling the victim in the murder for which they both were convicted. Although Brady had admitted to

participating in the crime, he maintained that he should not receive the death penalty because the companion had done the actual killing. Attempting to support his contention, Brady's attorney requested from the prosecution any statements made by the companion. *Id.* at 84. Despite this request, the prosecution did not provide the statement in which the companion admitted to committing the actual homicide. The statement, this Court found, was material to determining whether Brady should receive the death penalty. Because material evidence had been withheld, this Court ordered Brady to be resentenced. *Id.* at 90. In reviewing the prosecution's actions, Justice Douglas commented:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .

Id. at 87-88.

In its rulings refining *Brady*, this Court has continued to construe the prosecutor's obligation to disclose evidence favorable to an individual criminally accused. Indeed, because the *Brady* rule has been evolving since 1963, there is often much dispute about its scope—as is reflected in this Court's five subsequent major cases ("*Brady's* progeny") analyzing the scope of the prosecution's *Brady* duties.

In *Giglio v. United States*, 405 U.S. 150 (1972), the prosecutor failed to disclose to the defense that the government had promised leniency to a key prosecution witness, a promise that the defense could have used as impeachment evidence. *Id.* at 150-51. Applying *Brady's* mandate to impeachment evidence, as well as to classically exculpatory evidence, this Court ordered a new trial as a result of the prosecution's misconduct, stating that "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within" the rule of *Brady*. *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

In *United States v. Agurs*, 427 U.S. 97 (1976), this Court reviewed for *Brady* violations the second-degree murder conviction of a defendant for whom self-defense was the only argument presented. While the defendant had not requested (and the government had not disclosed) evidence that the victim had a criminal record, including convictions for assault and possession of a deadly weapon, this Court extended its holding in *Brady* to require disclosure of exculpatory material pursuant to a general request for information, or even no request at all, if it was likely to lead to a different verdict or judgment. *Id.* at 110. This Court concluded that undisclosed evidence should be deemed material, and therefore violative of *Brady's* command, if it "created a reasonable doubt that did not otherwise exist." *Id.* at 112.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court revisited the issue of "materiality" and held that undisclosed evidence is "material" for purposes of a *Brady* violation where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different." *Id.* at 682. Bagley, charged with violating federal narcotics and firearms statutes, filed a motion requesting "any deals, promises or inducements made to witnesses in exchange for their testimony." In response, the government provided affidavits from two government witnesses who asserted that their statements had been given without any threats, rewards, or promises of reward. *Id.* at 669-670. Following his conviction, Bagley learned that the government (Bureau of Alcohol, Tobacco and Firearms) had entered into contracts with the two witnesses, under which the government had promised to pay them money for their cooperation. *Id.* at 671. Finding that the prosecutor's response had misleadingly caused the defense to believe the witnesses could not be impeached, this Court remanded the case to the trial court to decide whether there was a "reasonable probability" that the result would have been different if the evidence had been disclosed to the defense. *Id.* at 684. In *Bagley*, Justice Blackmun defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome" of the case. *Id.* at 682.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this Court implicitly recognized that *Brady* may require the prosecutor to examine files held by other government agencies to determine whether they contain any material favorable to the defense. *Id.* at 57-60. In *Ritchie*, the defendant was charged with raping his thirteen year-old daughter. Under Pennsylvania law, Pennsylvania's Children and Youth Services (CYS), the agency investigating the suspected mistreatment, could not release its confidential reports except under certain enumerated circumstances. At the time of Ritchie's trial, those situations did not include release to law enforcement officials for use in a criminal

investigation. *Id.* at 44 n.2. Thus, the prosecutor had not seen the file, did not have access to it, and did not comply with the defense request to provide it. Nonetheless, this Court held that, under *Brady*, Ritchie was "entitled to have the CYS file reviewed . . . to determine whether it contains information that probably would have changed the outcome of his trial." *Id.* at 57-58. However, this Court never specifically discussed why the prosecutor must review the file and, in fact, ordered a review of the file by the trial court, not the prosecutor.

The next major case construing *Brady*, and appropos to the instant petition, is *Kyles v. Whitley*, 514 U.S. 419 (1995). Kyles was convicted of killing a woman at a grocery store in New Orleans. After a mistrial due to a hung jury, Kyles was convicted of first degree murder at a second trial and sentenced to death. At trial, Kyles claimed that a state witness had framed him. Before the first trial, the witness had changed his story to the police as to how he knew Kyles and why he thought Kyles was the murderer. Before the second trial, the witness again changed his story. The prosecution disclosed none of the witness' inconsistencies to the defense; further, the police had evidence linking the witness to other crimes at the grocery store, including another (unrelated) murder at that location. The police did not disclose this information to the defense. Moreover, they did not disclose some of the information to the prosecutor. *Id.* at 1563-64, 1568.

In its decision in *Kyles*, this Court explained that the materiality standard (set forth in *Bagley*) does not require a defendant to demonstrate that disclosure of the suppressed material would have ultimately resulted in an acquittal. *Kyles*, 514 U.S.

at 434. Instead, the standard requires a defendant to show that suppression of the relevant evidence caused him/her to receive a trial which did not "result[ ] in a verdict worthy of confidence." *Id.* After analyzing the prosecution's failure to disclose the exculpatory evidence, this Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial." *Id.* at 454. Apposite to the instant petition, this Court in *Kyles* explained how and why the responsibility for a defendant receiving a fair trial lies with the prosecutor—not the judge, jury, defense counsel, or police, but with the prosecutor[2]:

> But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. *This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.* . . . [For] since . . . the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any

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[2] The American Bar Association ("ABA") Standards for Criminal Justice recognize the unique role of the prosecutor and the importance of timely disclosure of favorable evidence to the defense. The ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993), Standard 3-3.11(a) provides:

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

> argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials

Id. at 437-38 (emphasis added).

Moreover, the *Kyles* Court stated:

> Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . And [disclosure] will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. at 439-40 (citations omitted).

Last (to date) in the *Brady* evolution is the decision in *Strickler v. Greene*, 527 U.S. 263 (1999). In *Strickler*, this Court reviewed a prosecutor's failure, in a capital murder case, to disclose exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness. *Id.* at 266. Justice Stevens clarified that "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice

must have ensued." *Id.* at 281-82. Finding that no prejudice had ensued from the non-disclosure, this Court declined to reverse the defendant's conviction. *Id.* at 296

As is demonstrated in these cases, *Brady* is the basis for the modern development of constitutional disclosure requirements.[3] The instant case presents another step in such development.

2. Contrary To The Decision Below, The Scope of the Prosecution's *Brady* Duty, As Refined in *Kyles*, Is Inclusive, Not Exclusive

In this case, the Sixth Circuit majority opinion (and the district court) found that Mr. Graham had not established a *Brady* violation because there was no suppression of his documents by the government. App. 10a; 29-30a. The district court found that the prosecutor's duty under *Kyles*, 514 U.S. at 437, to learn of "favorable evidence known to the others acting on the government's behalf in the case, including the police," did not extend to Allen or evidence in Allen's possession and thus, "Brady does not extend to his activity" App.30a. The majority opinion agreed with this finding by stating "[b]ecause Allen was not acting on behalf of the prosecution, [the] late production of evidence was not a *Brady* violation * * * [and] cooperating witnesses such as Allen stand in a very different position in relation to

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[3] *See* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 686 (2006) (commenting that "[m]ore than any other rule of criminal procedure, *Brady* has illuminated the prosecutor's constitutional and ethical obligations to ensure that defendants receive fair trials, as well as warning prosecutors of the consequences of violating the rule").

the prosecution than do police officers and other governmental agents." App. 4a; 8a.

The circumstances of this case demonstrate the fallacies in the majority opinion's reasoning vis a vis the prosecutor's duty-to-discover under *Kyles* and the meaning of "others acting on the government's behalf." *Id.* Indeed, the prosecutor's own notes from the March 15, 2004 interview of Allen show the prosecution's knowledge of the existence of Mr. Graham's files, which had not been disclosed to the defense. Their specific directive to their cooperating witness Allen was that before any such records were to be turned over to the defense, the prosecution must review the records "first." *See* Dissent, App. 20a ("[T]he government was fully aware, as of March 15, 2004, at the latest, that Allen had more of Graham's files and the government acted on that knowledge during trial by instructing Allen to return home and search those files for evidence that it could use to impeach Graham's testimony.") The prosecution's own notes demonstrate its dominion and control over Allen and any documents he possessed, including the fact that he was directed to show the documents to the prosecutor before any consideration could be given to providing them to the defense (which was not even done until Mr. Graham was on the stand testifying in his own defense).

With respect to the characterization in *Kyles* of "others acting on the government's behalf in the case, including the police," *Id.* at 437, this language is "inclusive, not exclusive, and at least implies that the duty begins rather than ends with the police"—as is stated by Judge Batchelder in her Dissent. App. 20-21a. Such a reading of *Kyles* is particularly applicable to Allen, who functioned as a de facto government

agent. The circumstances here were that for one year before Mr. Graham was even indicted, Allen was covertly providing information to the prosecution about his client Mr. Graham. At the same time, Allen was continuing to represent Mr. Graham as his trusted lawyer, tax advisor, and fiduciary. The evidence at trial established that while Allen was cooperating with the prosecution, he was working with the prosecutor by providing documents and leads about Mr. Graham's financial affairs. During this time, Allen traveled with Mr. Graham to Scotland, set up his business entities there, stayed in his house, provided tax advice, prepared his tax filings and rendered legal advice to Mr. Graham while simultaneously doing the bidding of the prosecutor. In sum, Allen was a government agent-without-portfolio.

Moreover, what Allen knew and what he possessed in terms of documents should be deemed to be notice to and within the knowledge of the prosecutor. This theory of attribution is analogous to civil rights law where private action is sometimes held to be so intertwined with government action as to render it state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

Most importantly, the majority opinion misconstrues this Court's use of the words "including the police" in *Kyles*, 514 U.S. at 437. The word "including" means that something is a part or constituent of a larger whole. *See* The American Heritage Dictionary of the English Language (4th ed. 2006) ("these verbs [include, included, including, includes] mean to take in or contain one or more things as part of something larger"); *see also American Surety Company of New York v. Marotta*, 287 U.S. 513, 517 (1933) ("In definitive provisions of statutes and other

writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration . . . the use of 'shall mean' [is] to enumerate and restrict and of 'shall include' to enlarge and extend."). Thus, the phrase "including the police" following the statement "others acting on the government's behalf" necessarily means that the word "others" includes the police as a part of a larger group.

It is reasonable to conclude that the police are but one example of persons acting on behalf of the government.[4]

The plain language used by the Supreme Court in *Kyles* is broad and its command, under circumstances as are presented here with Allen, reaches "others acting on the government's behalf in the case, including [but not limited to] the police." *Kyles*, 514 U.S. at 437. Such a reading of *Kyles*' scope is consistent with the fact that *Brady* and its progeny are grounded in the Due Process Clause of the Fifth Amendment to the Constitution rather than the Rules of Criminal Procedure. *See United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.").

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[4] *See* Laural L. Hooper, Jennifer E. Marsh & Brian Yeh, *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies—Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States*, Federal Judicial Center (October, 2004) (citing *Kyles v. Whitley*, 514 U.S. at 437 as the "subsequent Supreme Court decision [ ] [which] elaborated the *Brady* obligations to include the duty to disclose . . . evidence in the possession of persons or organizations (e.g., the police)").

B. The Decision Below Conflicts With This Court's Precedents Establishing The Prosecution's Duty And The Defendant's Right To Rely on Fulfillment Of That Duty

This Court has emphasized that the prosecution's duty under *Brady* reflects "the special role played by the American prosecutor in the search for the truth in criminal trials," as the representative of a government "whose interest . . . in criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler*, 527 U.S. at 281. Indeed, as a practical matter, the *Brady* doctrine has been implemented through the understanding that the prosecution will fairly and effectively fulfill its duty, thus making broad civil-style discovery unnecessary in criminal cases. *See Bagley*, 473 U.S. at 675 & n.6 ("the *Brady* rule represents a limited departure from a pure adversary model" as "the prosecutor's role transcends that of an adversary"); see also *Kyles*, 514 U.S. at 432 ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th - century strictures against misrepresentation. . . .").

Contrary to this Court's precedents, the decision below chooses to overlook the fact that the prosecution represented both expressly and impliedly that Allen had produced all the documents he possessed and that, in turn, it had nothing the defense did not have, when it knew that Allen had not produced all of the "Graham" files.

In view of the prosecutor's special role, this Court has made clear that where the government represents, as it did to Mr. Graham's counsel, that it has complied with its *Brady* obligations, the defense is

entitled to rely upon such representations and need not undertake further efforts to obtain *Brady* materials. *See Strickler*, 527 U.S. at 283 n. 23; *see also Shih Wei Su v. Filion*, 335 F.3d 119, 128 (2d Cir. 2003) (citing *Strickler* for the proposition that "conscientious counsel *can* rely on prosecutors to live up to their obligations" and that a defendant should not have to proceed "on the assumption that the prosecutor is a liar.") (emphasis in original). This Court subsequently reiterated and applied *Strickler's* holding in *Banks v. Dretke*, 540 U.S. 668 (2004), a case in which prosecutors argued that their failure to disclose certain relevant witness statements did not violate *Brady* because the defense could have located the witness itself. This Court noted that it had "rejected a similar argument in *Strickler*," in which the State had "contended that examination of a witness' trial testimony, alongside a letter the witness published in a local newspaper, should have alerted the petitioner to the existence of" the statements. *Banks*, 540 U.S. at 695. Accordingly, the *Banks* Court rejected the prosecution's argument, finding that because "the State asserted, on the eve of trial, that it would disclose all *Brady* material . . . [and] [a]s *Strickler* instructs, *Banks* cannot be faulted for relying on that representation." *Id.* at 693. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. Rather, a defendant is "entitled to treat the prosecutor's submissions as truthful." *Id.* at 698.

Further, the inference in the decision below (*see* App. 9a) that the prosecution's non-disclosure, if indeed such did occur, should be excused in that it was not purposeful because the prosecutor had no

control over Allen is flawed as a matter of law and fact. It is well-settled that *Brady* is violated by the "inadvertent" failure to disclose relevant evidence to the defense. *Strickler*, 527 U.S. at 289. *Accord, e.g., Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) ("*Brady* has no good faith or inadvertence defense." (citing *Agurs*, 427 U.S. at 110 ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." (footnote omitted)); *Giglio*, 405 U.S. at 154 ("Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.")). The *Brady* rule is designed to ensure that the defendant receives a fair trial, not to punish prosecutors for bad-faith conduct.

C. The Question Presented Is Important And Recurring And Should Be Decided By This Court.

This case presents a question of exceptional importance in that it affects virtually every case in which the prosecution has a duty to learn of "favorable evidence known to the others acting on the government's behalf." *Kyles*, 514 U.S. at 437. As stated *supra*, the question is whether the prosecution's duty-to-discover under *Kyles* extends to its cooperating witness, who covertly works with the prosecutor pursuant to a cooperation agreement and who possesses exculpatory information, or is the prosecutor's duty-to-discover limited to police officers and government agents.

The Sixth Circuit's interpretation of that duty improperly skewed both the spirit and the letter of this

Court's prior decisions in *Brady* and the cases evolving therefrom. By permitting *Kyles* to be read restrictively (as it was in the decision below)—i.e., as confining the prosecution's duty-to-discover exculpatory information possessed by third parties to only police officers or "official" investigators—this Court will leave unclear, if not open, the extent to which *Brady* applies to private parties (particularly cooperating informants) who work hand-in-hand with the prosecution. In the absence of continued guidance from this Court, lower courts will continue to struggle to define and interpret the scope of the prosecutor's duty to search for the truth and to disclose evidence.[5] This is particularly troubling because criminal cases in which the prosecution relies on one or more cooperating witnesses have been growing exponentially since the *Kyles* decision in 1995. There is no reason to believe the government will reduce its reliance on these cooperating individuals. Indeed, the significant number of cases based primarily on the cooperation of an informant are compelling evidence of the recurring and important nature of the question presented by this case.

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[5] See Robert Hochman, *Comment: Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U.Chi.L.Rev. 1673, 1676-77 (1996) (noting that while the classic *Brady* claim involves undisclosed exculpatory material in the prosecutor's possession, a second kind of *Brady* claim can be called a "search *Brady* claim" arising when the prosecutor "fails to gather, or to receive from others [material] evidence . . . . favorable to the defense [and that this Court] has considered search *Brady* questions only three times [in *Giglio*, *Pennsylvania v. Ritchie*, and *Kyles* and] has offered little analysis and has failed to explain fully the scope of search *Brady* duties").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-2332/2347

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH J. GRAHAM (05-2332);
KYLE DRESBACH (05-2347),
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 03-80504—Arthur J. Tarnow, District Judge.

Argued: December 6, 2006
Decided and Filed: April 20, 2007

Before: BATCHELDER, GILMAN, and ROGERS, *Circuit Judges*.

COUNSEL

ARGUED: Albert J. Krieger, Miami, Florida, Joan Ellerbusch Morgan, Sylvan Lake, Michigan, for Appellants. John Hinton, III, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Albert J. Krieger, Susan W. Van Dusen, Miami, Florida, Joan Ellerbusch Morgan, Sylvan Lake, Michigan, for Appellants. John Hinton, III, Alan Hechtkopf, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

ROGERS, J., delivered the opinion of the court, in which GILMAN, J., joined. BATCHELDER, J. (pp. 9-10), delivered a separate dissenting opinion.

OPINION

ROGERS, *Circuit Judge*. The criminal defendants in this appeal contend that the failure of the Government's cooperating witness to produce fifteen boxes of evidence until late in the trial constituted a violation *of Brady v. Maryland*, 373 U.S. 83 (1963). Defendants Kenneth Graham and Kyle Dresbach were convicted of conspiracy to commit mail fraud and to file false tax returns, conspiracy to commit money laundering, money laundering, and subscribing false tax returns. These charges were based on a kickback scheme in which the defendants caused Thyssen, Inc., a steel processing company, to overpay for equipment while a portion of the amount fraudulently charged was funneled back to the defendants through shell entities created by their attorney, Jerome Allen. Allen was an unindicted co-conspirator who acted as a cooperating witness for the Government pursuant to a plea agreement.

Near the end of the defendants' trial, Allen produced fifteen boxes of documents, some of which pertained to his representation of Graham. Graham and Dresbach argue that the district court erred by failing to find that the Government violated its obligations under *Brady* by not causing these documents to be produced earlier. The Government responds that these documents were not material under *Brady* and that there was no violation of *Brady* because the evidence was in the exclusive control of a cooperating witness and not the Government. Dresbach also raises issues involving alleged ineffective assistance of counsel, improper failure to

sever the two cases, and error in the giving of a supplemental jury instruction after the jury had indicated that it had reached a verdict.

Because the cooperating witness here was not acting on behalf of the Government, and the defendants' other contentions do not warrant reversal, the convictions of both defendants are affirmed.

I. General Background

On May 20, 2003, a federal grand jury returned a ten-count indictment against Graham and Dresbach, charging both with conspiracy to commit mail fraud and to file false tax returns, conspiracy to commit money laundering, money laundering, and subscribing false tax returns. The Government filed a superseding indictment on September 18, 2003. The essence of the Government's case was that Graham and Dresbach conspired to defraud Thyssen, Inc., a steel processing company headquartered in Detroit, Michigan, of $6.5 million in a kickback scheme spanning from 1991 to 2001.

Graham was Thyssen's chief executive officer until 2001, and Dresbach was the company's executive vice president until he retired in 1996. The Government alleged that Graham and Dresbach used their positions at Thyssen to cause the company to purchase machinery at fraudulently inflated prices. The inflated prices included higher commissions for an equipment broker, who then funneled the excess commissions to Jerome Allen, an accountant and attorney who worked for Graham and Dresbach. Allen then distributed part of the money to Graham and Dresbach, primarily by writing checks to pay for personal expenses as directed by the defendants.

Graham and Dresbach were tried jointly before a jury in a trial that began on July 22, 2004. Allen was an unindicted co-conspirator in the case and testified against the defendants pursuant to a plea deal with the Government. On August 12, 2004, the jury convicted Graham and Dresbach on all counts charged in the superseding indictment. Both defendants filed motions for a new trial. The district court denied those motions on June 8, 2005. On August 30, 2005, the district court sentenced both defendants. These timely appeals followed.

II. Graham's Appeal

Graham's appeal arises from Allen's production of fifteen boxes of financial and legal documents three weeks into the trial. Because Allen was not acting on behalf of the prosecution, this late production of evidence was not a *Brady* violation.

Graham asserts that, approximately one year prior to the start of trial, his attorneys demanded that Allen turn over all documents in Allen's possession pertaining to Graham. Graham alleges that he received a total of five boxes from Allen's counsel and was told that they contained all of the files and records related to Graham that Allen possessed. On March 15, 2004, the prosecutors and case agent again interviewed Allen as part of their final trial preparation. The prosecutors' notes from that interview included the following comment: "Haven't turned over old files, 1980s, to Graham's attorney. We want to review them first." Despite this note, nothing in the record indicates that the Government ever had possession of these files.

On June 29, 2004, the Government sent a letter to Graham's attorney, erroneously indicating that the

notes pertaining to the Allen interview were enclosed. Graham's attorney informed the Government of the missing enclosures during the final pretrial conference on July 19, 2004. On that day, the Government provided Graham copies of the notes and the district court granted a two-day adjournment.

On July 22, 2004, prior to the commencement of opening statements, Graham moved to dismiss the indictment based on the fact that Allen possessed files that had not been turned over to Graham. During oral argument on the motion, the Government explained the nature of the interview notes turned over to the defendants only a few days earlier and stated that the Government had already provided Graham with all the documents that it had received from Allen. The court denied the motion.

On the evening of August 5, 2004, three weeks into trial, the Government notified Graham's attorney that Allen had produced copies of four previously undisclosed promissory notes from the early 1990s. The next day, Graham moved for a mistrial based on the late disclosure of that evidence. During the hearing on the motion, Allen's attorney reported that the new documents were found in a previously undiscovered box of Graham documents. In response to a subsequent subpoena, Allen produced fifteen boxes of documents.

Defendants again moved for dismissal of the charges and, in the alternative, for a mistrial. When Allen was questioned about the fifteen boxes, he testified that he had actually found the boxes "a month, a month and a half ago" while cleaning out some storage lockers containing old client files. At least some of these boxes were marked "Graham." Allen thought that he had informed the Government

of the existence of these boxes at that time, though he himself "hadn't looked at them" and did not know about the contents of the boxes until August 5, 2004, when the Government asked Allen's attorney to inquire as to whether Allen had any old tax returns going back to 1974. The district court denied the motion for mistrial because there was no evidence of concealment by the Government; the court noted that the defendants could renew the motions if exculpatory material were found in the fifteen boxes.

The trial continued, and on November 15, 2004, three months after the jury had returned guilty verdicts on all counts, Graham renewed his motions for a mistrial, dismissal, and a new trial, attaching twenty-seven exhibits culled from the fifteen boxes. The district court denied Graham's motion for a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963), because it found that the Government had not suppressed the fifteen boxes in Allen's possession. The district court also denied Graham's motion for a new trial under Rule 33(a). Graham now challenges the district court's *Brady* determination.

Graham cannot show that the Government suppressed the evidence upon which he bases his appeal; therefore, he cannot establish a violation of due process under *Brady*. Because Allen was not "acting on the government's behalf," the Government cannot be said to have suppressed the fifteen boxes of documents in Allen's control. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

This court reviews denial of a motion for new trial based on *Brady* violations under an abuse of discretion standard. *United States v. Jones*, 399 F.3d 640, 647 (6th Cir. 2005). However, the district court's determination as to the existence of a *Brady* violation

is reviewed de novo. *United States v. Miller*, 161 F.3d 977, 987 (6th Cir. 1998).

To establish a *Brady* violation, Graham has the burden of showing that the Government suppressed evidence, that such evidence was favorable to the defense, and that the suppressed evidence was material. *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000). '*Brady* is concerned only with cases in which the government possesses information which the defendant does not.' Further, there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source." *Id.* (quoting *United States v. Mullins*, 22 F.3d 1365, 1371 (1994)).

Graham's claim fails to satisfy the suppression prong of the *Brady* analysis, because he has not shown any withholding of evidence within the control of the Government. *Brady* and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control. "But *Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975). Graham never alleges that the Government actually possessed the fifteen boxes of evidence at issue here. Rather, it is undisputed that the evidence was in the personal control of Allen until he disclosed it to all parties late in the trial. Nonetheless, Graham argues that the Government exercised effective control over the evidence because Allen was a coop-

erating witness. Neither the case law nor the facts of this case support this argument.

Kyles v. Whitley, 514 U.S. 419 (1995), relied upon by Graham to argue that Allen was a de facto agent of the Government, does not require reversal based on Allen's failure to produce the undisclosed evidence. *Kyles* dealt with whether undisclosed evidence was sufficiently material to warrant reversal of a conviction. The state argued in part that some of the favorable evidence was in the hands of the police but was not, disclosed to the prosecution until after trial. *Id.* at 438. In its analysis, the Supreme Court commented that *Brady* imposed upon the individual prosecutor "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 437. However, cooperating witnesses such as Allen stand in a very different position in relation to the prosecution than do police officers and other governmental agents. The Supreme Court in this regard relied directly on the fact that "the prosecutor has the means to discharge the government's *Brady* responsibility if he will." *Id.* at 438. That is not necessarily the case with regard to cooperating witnesses, as the circumstances of this case demonstrate.

Even if the scope of the prosecutor's liability in theory could extend to a cooperating witness if that witness were sufficiently identified with the prosecution team (a question that we do not reach in this case), the record here does not support Graham's contention that Allen was in effect a government agent. While cooperating with the Government pursuant to the terms of his plea agreement, Allen remained an independent actor. As evidence of this fact, the Government notes that it had to obtain

approval from Allen's attorney before interviewing him and had to serve a subpoena on him to compel the production of documents. Another clear indication of Allen's independence from the Government is the fact that Allen refused to provide the Government with materials that were covered by the attorney-client privilege.

As evidence of the Government's control over Allen, Graham cites the note taken during a March 15, 2004, interview with Allen. In that interview, the Government learned that Allen may have possessed additional records relevant to Graham that had not been disclosed to any party. The anonymous note said in part, "Haven't turned over old files, 1980's, to Graham's attorney. We want to review them first." Although it is appears from this note that the Government was interested in any older files Allen might possess, it does not show, and Graham does not allege, that the Government actually had possession of the fifteen boxes at issue here. It was not until Allen produced the fifteen boxes during trial that either party had any knowledge of their contents. Therefore, contrary to Graham's argument, this note falls short of demonstrating that the Government had control over Allen or any documents remaining in his possession.

Graham additionally argues that Allen acted as a "government agent-without-portfolio" during the Government's investigation of Graham. The only evidence Graham offers to support this argument is the fact that Allen continued to provide legal services and collect fees from Graham even after Allen had begun secretly cooperating with the Government. However, there is no evidence in the record that Allen did anything other than review the Govern-

ment's evidence of the kickback scheme and agree to plead guilty and cooperate. Absent any evidence that the Government had sufficient control over Allen to transform him into an agent of the prosecution, Graham's argument that the Government suppressed documents within Allen's exclusive control fails.

Because the evidence upon which Graham bases his *Brady* claim was not suppressed by the Government, we need not reach the materiality prong of the *Brady* analysis.

We also do not reach the claim of prosecutorial misconduct that Graham's counsel raised for the first time at oral argument. The substance of that claim appears to be that because the Government knew of the possible existence of additional documentary evidence that Graham had not had an opportunity to review, it was a violation of due process for the Government in closing argument to refer to the absence of documentation supporting Graham's defense. Because prosecutorial misconduct was never raised or argued in his briefs to this court, Graham has abandoned this issue for purposes of this appeal. *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006).

III. Dresbach's Appeal

Dresbach raises three issues in addition to Graham's *Brady* argument that we rejected above. Dresbach argues that the district court erred in refusing to grant his motion for severance before trial. He also asserts that the district court abused its discretion by giving supplemental jury instructions after the jury notified the court that it had reached a verdict. Finally, he alleges a violation of his right

to effective assistance of counsel. Each of these arguments fails.

A.

Dresbach cannot show any error in the district court's denial of his motion to sever. Before his trial began, Dresbach filed three motions asking the district court to sever the defendants' trials. Dresbach's argument in favor of severance in each was essentially that most of the evidence at trial would pertain to Graham and not to Dresbach. The district court denied Dresbach's motions and tried the defendants jointly.

Dresbach does not dispute the fact that key testimony concerning the underlying kickback scheme, such as the testimony of Jerome Allen, pertained to both defendants. At trial, Graham presented a defense based on the existence of alternative sources of cash (a "cash hoard") and the existence of a prior loan to Allen, both of which allegedly accounted for the proceeds of the conspiracy. Much of the evidence at trial was directed at rebutting Graham's defenses, and therefore did not pertain to Dresbach. Dresbach also asserted that "he was never in any conspiracy," but argued in the alternative that, if the jury decided that he was in a conspiracy, he should nonetheless be acquitted because he would have withdrawn from the conspiracy upon his retirement from Thyssen in 1996, and therefore the statute of limitations had expired.

In this appeal, Dresbach maintains that the district court erred in not granting his motion because "the overwhelming evidence at trial pertained exclusively to Graham's case" and because the defenses offered were mutually antagonistic. This court

recently addressed Dresbach's first contention in *United States v. Gardiner*, 463 F.3d 445 (6th Cir. 2006). In *Gardiner*, defendant Lupo made exactly the same argument: "'[t]he overwhelming evidence at trial pertained to Gardiner's case and did not involve Mr. Lupo. The jury was left with no other to conclusion to reach but that, due to the strong case against Gardiner, Lupo must also be guilty.'" 463 F.3d at 473 (quoting defendant's brief). This court held that:

> Lupo's argument is expressly foreclosed by the *Warner* holding that severance is not required because the proof may be stronger against one defendant than another. Lupo's argument that more evidence was presented at trial against Gardiner is not enough to show specific, actual or compelling prejudice. Accordingly, Lupo's motion for severance was properly denied.

Id. (citing *United States v. Warner*, 971 F.2d 1189, 1196 (6th Cir. 1992)). *Gardiner*'s holding clearly applies to Dresbach's claim here. Furthermore, although the nature of the evidence offered in Graham's defense prompted the Government to present rebuttal evidence against Graham which did not pertain to Dresbach, the central evidence of the kickback scheme that gave rise to the charges against both defendants was the same.

Dresbach's contention that his and Graham's defenses were antagonistic is equally without merit. This court has held that "[t]he burden is on defendants to show that an antagonistic defense would present a conflict 'so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" *Warner*, 971 F.2d at 1196 (citations omitted).

"[A] difference in trial strategies [does not] mandate separate trials." *Id.* While Dresbach and Graham pursued different strategies at trial—Dresbach relied primarily on a withdrawal defense and Graham presented evidence of alternative sources of income—there is simply no logical inconsistency between their defenses. Because Dresbach cannot show that there is any conflict between the defense theories, the district court properly denied his motion for severance.

B.

The district court did not abuse its discretion by giving a supplemental jury instruction concerning the statute of limitations on Counts 1 and 2. In its original instruction to the jury, the district court stated that, with regard to the alleged conspiracies, the jury had to find that a member of the conspiracy did at least one of the overt acts specified in the indictment. The district court also instructed the jury to list all the overt acts that it found beyond a reasonable doubt on a special verdict form. After the jury retired for deliberations, the Government brought to the district court its concern that, because of the limited space provided on the jury form and relying on the "at least one overt act" instruction, the jury might provide only a partial listing and leave off acts that would be relevant to Dresbach's withdrawal and statute of limitations defense. The Government proposed the following supplemental instruction:

> If the government fails to prove that an overt act occurred after May 20, 1998, then Mr. Graham and Mr. Dresbach cannot be convicted of the conspiracies charged in Counts 1 and 2, because the statute of limitations has run, and you must find them not guilty. Therefore, before you can return a verdict of guilty on Counts 1 and 2 for

> either Mr. Graham or Mr. Dresbach, you must unanimously agree that at least one overt act was committed after May 20, 1998.

Dresbach objected to the district court's giving any supplemental instruction because it would be unfair to change the instructions after the parties had made closing arguments. Dresbach's counsel also argued that since the jury had not asked for clarification and had already indicated that it had reached a verdict, there should be no change in the instruction. The district court stated that it believed the supplemental instruction was to the benefit of both defendants, especially Dresbach. The district court held that the original instruction contained "an error of omission," and delivered the supplemental instruction.

Dresbach argues that the district court lacked authority to give the supplemental jury instruction absent a request for clarification from the jury and after an announcement by the jury that it had reached a verdict. Additionally, Dresbach asserts that the effect of the challenged instruction in this case was to overemphasize the need to find an overt act after May 20, 1998, effectively directing the jury to find an overt act that had occurred within the limitations period.

Dresbach relies on Federal Rule of Criminal Procedure 30 for his contention that the district court had no authority to give the supplemental instruction in this case. However, as other courts have recognized, "[b]y its terms and, as a matter of necessity, Rule 30 refers only to rulings on instructions requested by counsel ' [a]t the close of the evidence or at such earlier time' as the court directs . . . . The rule simply does not prescribe the procedure for supplemental instructions after the jury has retired."

United States v. Andrade, 135 F.3d 104, 110 (1st Cir. 1998) (quoting Fed. R. Crim. P. 30 and citing *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir. 1994)).

Furthermore, this court has recognized that it is sometimes necessary and proper for the trial court to re-charge a jury to correct possible misunderstandings based on the original instruction given. *See United States v. Oliver*, 766 F.2d 252, 254 (6th Cir. 1985). It is firmly established that a trial court's duty to give instructions "exists independently of questions from the jurors." *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002).

That the jury had already informed the court that it had reached a verdict does not render the supplemental instruction improper. In other contexts, this court has held that until a jury verdict is announced and accepted, a verdict is not official and the jury remains under the authority of the trial court. *See United States v. Love*, 597 F.2d 81, 85 (6th Cir. 1979). Therefore, the mere fact that the jury had sent a note stating that it had concluded its deliberations did not relieve the trial court of its authority to instruct the jury on the law of the case.

Finally, Dresbach asserts, without explanation, that the supplemental instruction here overemphasized the statute of limitations issue and directed a verdict for the Government. Dresbach's objection to the emphasis that the instruction placed on the statute of limitations issue is difficult to comprehend in light of the assertions contained in his brief that the primary defense offered on his behalf at trial was that he had "withdrawn from the conspiracy and the statute of limitations had run," and that "[t]his was a critical issue at trial, one which both parties argued

in closing arguments." In fact, Dresbach raised this issue in his motion to dismiss, in his opening statement, and in his summation.

Dresbach's related assertion that the effect of the supplemental instruction was to direct the jury to find overt acts that occurred in the limitations period is also without merit. The wording of the instruction clearly placed the burden for proving an overt act after May 20, 1998, on the Government, and instructed the jury that "you must unanimously agree that at least one overt act was committed after May 20, 1998." Further contradicting Dresbach's assertion that the supplemental instruction essentially directed a verdict is the district court's preface to the instruction asking the jury to listen carefully and "then retire to the jury room and see if it has any impact on your verdict or not." Both the text of the instruction and the court's preface make it clear that the determination of whether there was an overt act within the limitations period was entirely left to the jury. Accordingly, the district court did not abuse its discretion in choosing to give the supplemental jury instruction at issue here.

C.

Because the record on direct appeal is inadequate to address Dresbach's claim of ineffective assistance of counsel, we do not reach it.

Dresbach argues that his trial counsel's performance was inadequate in several ways, including: failure to investigate public records which would have contradicted material elements of Allen's testimony, failure to object to the admission of a deposition that contradicted other statements the witness made to the Government and the related

failure to introduce the previous exculpatory statements, failure to subpoena material information, multiple instances of unprofessional conduct, failure to present evidence of other sources of income and cash as an alternative to Dresbach's withdrawal and statute of limitations defense, and failure to be present for a conference in which the court discussed the admission of exhibits.

This court will not ordinarily consider ineffective assistance of counsel claims on direct appeal because the record usually is not sufficiently developed to permit proper assessment of such claims. *See United States v. Brown*, 332 F.3d 363, 368-69 (6th Cir. 2003). "This rule stems from the fact that a finding of prejudice is a prerequisite to a claim for ineffective assistance of counsel, and appellate courts are not equipped to resolve factual issues. As a result, our court has routinely concluded that such claims 'are best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 so that the parties can develop an adequate record on this issue.'" *United States v. Aguwa*, 123 F.3d 418, 423 (1997) (citations omitted).

Multiple factual issues that are not developed in this record must be resolved to assess Dresbach's claim properly. For example, the record contains no evidence, beyond Dresbach's allegations, of the public records which Dresbach asserts should have been used in the impeachment of Allen. Similarly, at this time the court has no indication of what, if any, additional evidence existed concerning Dresbach's other sources of income which could have been offered at trial.

In light of the insufficiency of the evidence in the record before this court, Dresbach's claim should

await consideration in a post-conviction proceeding under § 2255.

IV.

For the foregoing reasons, the convictions of both defendants are affirmed.

DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting. I write separately to express my view that the circumstances of this case constitute a violation of the defendants' right to due process. Because I would reverse the district court and order a new trial, I must respectfully dissent.

I believe the evidence contained in the suppressed files is of sufficient exculpatory and impeachment value to demonstrate materiality and warrant a new trial. The promissory notes support the defendants' theory and impeach the prosecution's key witness, Jerome Allen. Other financial statements, signed in blank to be filled in by Allen, support the defendants' theory that they had trusted Allen and often signed legal documents without reading them, which the prosecution had decried as unbelievable and unsupported by any evidence. Original records from Commerzbank document deposits of almost $600,000 to an account in Graham's name, earning annual interest of 12 to 18%, which directly contradicts prosecution testimony that no such account existed. The transactions, withdrawals, and deposits of extremely large amounts of cash support the defense theory, which the prosecution had repeatedly characterized to the jury as "fantastic."

Under our Constitution and our system of justice, the prosecution is obligated to disclose to the defense all impeaching or exculpatory evidence in its possession. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution also has a duty to learn of "favorable evidence known to others acting on the government's behalf." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The defense need not request this information from the prosecution and inadvertence is no excuse.

Strickler v. Greene, 527 U.S. 263, 280-82 (1990). Therefore, the defense is entitled to rely on the prosecution's representations regarding its compliance with its *Brady* obligations. *Banks v. Dretke*, 540 U.S. 668 (2004). The rule is not designed to punish the prosecution for misconduct, but to ensure that defendants receive fair trials. *See United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.").

In the present case, the district court framed the question as whether it is "negligence for the Government to be stonewalled by their snitch," and held that "[i] f there was suppression in this case, it was Allen's doing, not that of the government, and *Brady* does not extend to his activity." I believe this mischaracterizes the question. The government was not "stonewalled" in this case—as is evident from both the government's conduct and Allen's testimony. On the contrary, the government was fully aware, as of March 15, 2004, at the latest, that Allen had more of Graham's files and the government acted on that knowledge during trial by instructing Allen to return home and search those files for evidence that it could use to impeach Graham's testimony.

Ultimately, the district court reasoned that the prosecution's duty-to-discover under *Kyles* is only applicable to police officers and government agents, and does not extend to cooperating witnesses such as Allen, i.e., "snitches." I disagree with this reading of *Kyles*, which states: "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. In my view, this language is inclusive, not exclusive, and at

least implies that the duty begins rather than ends with the police. The limitation to police is particularly suspicious in this case where Allen, while continuing to represent the defendants as lawyer, fiduciary, and tax advisor (even preparing Graham's 2002 tax returns), was covertly providing information to the government in accordance with his plea and cooperation agreement, and was providing documents to the government prosecutor, while those exculpatory files—which were actually Graham's property —sat, unbeknownst to Graham, in Allen's garage. Although it is unclear if or why Allen failed to disclose the extra files to the government before March 15, 2004, there can be no dispute that he did so at that time, and the government's alleged "disclosure" to the defendants is dubious at best.

The government criticizes the defense for failing to subpoena Allen, but Allen—via his personal attorney—had told Graham and Dresbach that he had already provided *all* the files in his possession and the rest had been destroyed. Furthermore, a client need not obtain a subpoena to retrieve his own files from his own attorney. The government also criticizes the defense for failing to move for an order, but that is not required under *Strickler*, and the government had already exclaimed that Allen had no more of Graham's files and that it had provided the defense with all there was to provide. The government contends that the defense had just as much access to the files as it did, but it was the government that led the defense to believe that there were no more files, it was the government that had control over Allen via the cooperation agreement and the ability to penalize Allen for withholding information from them, and it was the government that ordered Allen to retrieve the files from, his garage, knowing

that Allen had more files, even after asserting to the defense that he did not Finally, the government contends, as the district court suggested, that this was a failure of "defense preparation rather than prosecutorial misconduct." But, even if that were true, *Brady* is not a rule to deter prosecutorial misconduct, and innocence is not an excuse.

The prosecution should not be allowed to cherry-pick the incriminating evidence out of a cooperating witness's files and leave the rest, only to hide behind the assertion, when challenged, that it never had actual possession of those (exculpatory) files and therefore had no obligation to provide them to the defense. Whether or not the prosecution intentionally engaged in such conduct in this case, it is clear that the prosecution provided some (hand-picked) files while allowing the defense to believe mistakenly that it had received from the prosecution all the files that were available. Even if the government was innocent and equally misled by Allen, as it now seems to argue, that is no answer. *Brady* is intended to ensure that the defendant gets the same evidence that is available to the prosecution. That is why the government must pursue it and provide it, even if the defendant does not specifically ask for it. By failing to construe the rule as a guarantee of fairness, the district court improperly limited *Brady, Strickler*, and *Kyles*.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-80504

Honorable Arthur J. Tarnow
United States District Judge

UNITED STATES OF AMERICA,
Plaintiff,

v.

KENNETH J. GRAHAM, *et al.*,
Defendants.

OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL [144,146]

I. INTRODUCTION

On August 12, 2004, a jury convicted Defendants, Kenneth Graham and Kyle Dresbach, of conspiracy to subscribe false tax returns and to commit mail fraud and money laundering, and the substantive offenses of money laundering and subscribing false tax returns. Defendants have filed motions for new trial. The Court heard oral argument on February 23, 2005, after which it took the motions under advisement. Having reviewed the record and applicable law, the Court DENIES both motions.[1]

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[1] Remaining before the Court is the government's motion for preliminary order of forfeiture. The Court has heard argument on this motion and will issue a ruling at the time of sentencing.

II. FACTS AND PROCEDURAL HISTORY

On May 20, 2003, the government indicted Graham and Dresbach for conspiracy to commit mail fraud and file false tax returns; conspiracy to commit money laundering; money laundering; and subscribing false tax returns. The government filed a superseding indictment on September 18, 2003. The crux of the government's case was that Graham and Dresbach conspired to defraud Thyssen, Inc., N.A., a steel processing company headquartered in Detroit, Michigan, of $6.5 million dollars in a "kickback" scheme spanning more than a decade.[2] The government asserted that Defendants caused Thyssen to enter into agreements to purchase machinery (cranes and slitting machines) at fraudulently inflated prices. The inflated prices resulted in higher commissions for an equipment broker, who then funneled the excess commissions to Graham, Dresbach, and Jerome Allen, the former attorney for Defendants and Thyssen and an un-indicted co-conspirator.[3]

A jury trial began on July 22, 2004. The intricacies of the scheme, as laid out by the government, were as follows: Graham and Dresbach had their equipment suppliers, Ranez Equipment and Chicago Slitter, inflate their invoices in order to pay commissions to a consultant, Hurricane Machine. Hurricane was run by Robert Murdock, who paid the commissions, as well as monies obtained from Thyssen for fictitious

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[2] Graham and Dresbach were founders of the company which merged into Thyssen. Graham is a former CEO of Thyssen. He retired in 2001. Dresbach was Thyssen's Executive Vice-President. He resigned in December 1996.

[3] Allen pleaded guilty in a separate case and is awaiting sentencing.

consulting fees, to one of more than a dozen shell entities created by Allen. From those commissions, Allen wrote checks to Graham and Dresbach, and converted portions for his own use. He also helped conceal the money and filed false tax returns on behalf of Graham and Dresbach.

On August 12, 2004, the jury convicted Graham and Dresbach of all counts charged in the superseding indictment.

III. DISCUSSION

A. Defendant Graham's Motion for New Trial, Renewal of Prior Motions, and Dismissal

Graham's motion for new trial is based upon fifteen boxes of financial and legal documents which were produced by Allen, the government's principal witness, after the government concluded its case-in-chief. As will be discussed below, Graham's theory of defense was two-fold: (1) he had a cash hoard which had accrued prior to the years charged in the indictment, and (2) he had loaned large sums of money to Allen in the late 1980s and early 1990s but had no promissory notes to evidence those loans.

He argues here that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce the files sooner. Further, the suppression of the documents during the trial compromised his Sixth Amendment right to confront the witnesses against him and his Fifth Amendment right to a fair trial. Graham also argues the 40,000-plus documents contained in the fifteen boxes constitute newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. If he had known about the files well in advance of trial, he insists, he would not have relinquished his Fifth Amendment right to

remain silent by taking the witness stand. Nor would the government have called his first wife, Norine Graham, as a rebuttal witness. Finally, Graham argues that the Court erred in re-instructing the jury after it had reached a verdict.

1. Entitlement to New Trial Under *Brady*

Due process prohibits the government from suppressing evidence which is favorable to an accused and material to guilt or punishment. This prohibition applies to both exculpatory and impeachment evidence. *Mason v. Mitchell*, 320 F.3d 604, 628 (6th Cir. 2003) (citing *Brady,* 373 U.S. 83)). However, "not every failure to disclose evidence favorable to the defense requires a reversal of a conviction." *Schledwitz v. United States*, 169 F.3d 1003, 1011 (6th Cir. 1999) (quoting *United States v. Veksler*, 62 F.3d 544, 550 (3d Cir. 1995)).

When a defendant asserts that newly discovered *Brady* evidence is exculpatory and seeks a new trial on that ground, the defendant must show that (1) the prosecutor suppressed the evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material. *Moore v. Illinois*, 408 U.S. 786, 794- 95 (1972). In conducting a materiality analysis, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Schledwitz*, 169 F.3d at 1011 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). This requirement is not a sufficiency-of-the-evidence test. *Id.* at 1012 (citing *United States. v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996)). Any favorable evidence is material if "there is a reasonable probability that, had the evidence been disclosed to

the defense, the result of the proceeding would have been different." *Id.* (Quoting *Kyles,* 514 U.S. at 433-34)). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.*

a. Did the prosecution suppress the fifteen boxes of Allen files?

Graham asserts that, approximately one year prior to the start of trial, he asked Allen to turn over all files in his possession pertaining to him. Allen produced a total of five boxes on June 11, 2003, and October 5, 2003, telling Graham that he had given him all records in his possession. On March 15, 2004, a government agent, memorializing an interview with Allen, noted:

> "Haven't turned over old files, 1980s, to Graham's attorney. We want to review them first."

On June 29, 2004, the prosecutor sent a letter to Graham's attorney, explaining that the notes pertaining to the Allen interview were enclosed. Graham's attorney received the letter—minus the enclosures—on July 1, 2004. He informed the prosecutor of the missing enclosures during the final pretrial conference on July 19, 2004. On July 20, 2004, the day on which trial was scheduled to begin, the Court granted a two-day adjournment.

On July 22, 2004, prior to the commencement of opening statements, Graham moved to dismiss the indictment based on governmental misconduct and violations of the Fifth Amendment and *Brady*. The motion was based on the fact that the 1980s files mentioned in the March 15, 2004, letter had not been turned over to him. The Court denied the motion.

On the evening of August 5, 2004, the prosecutor notified Graham's attorney that Allen had delivered to him four promissory notes from the early 1990s. On Friday, August 6, 2004, Graham moved for mistrial. The existence of the notes, he argued, undermined his theory that Allen destroyed any evidence of loans from him. On that day, the Court and Graham learned of the existence of a box containing files kept by Allen and pertaining to Graham. The Court took the motion under advisement and urged the parties to attempt a stipulation regarding the documents over the weekend.

The hearing on Graham's motion for mistrial resumed on August 9, 2004. Graham's attorney informed the Court that eighteen (in actuality, fifteen) boxes of Allen's documents were delivered to Defendants over the weekend, and it would take months to figure out which, if any, of the documents were relevant. The Court denied the motion for mistrial on the basis that there was no evidence of concealment by the government.

Graham now argues that, once the government realized on March 15, 2004, that Allen had files pertaining to Graham in his possession, there arose an affirmative duty on the part of the government to send agents to search the location where the files were kept. The government responds that, sometime after March 15th, it received several records from Allen. The government gave those records to Graham's attorney. The government insists it had no way of knowing that Allen had fifteen boxes remaining in his possession. Further, the indictment did not charge Defendants with illegalities occurring in the 1980s; thus, the government had no reason to assume that the files from the 1980s would be relevant. The

government did not review any records other than those provided to the defense.

Neither party has cited any cases which have extended, or declined to extend, *Brady* to evidence which is in the exclusive control of a cooperating witness and of which the government's knowledge is not certain. Of the cases cited by Graham, he relies most heavily on *Kyles*, 514 U.S. 419. The *Brady* issue presented there was whether the State of Louisiana could be held accountable for evidence known only to the police investigator and not to the prosecutor. The Supreme Court held that *Brady* imposes upon the individual prosecutor "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 438.

Kyles is not dispositive. Cooperating witnesses such as Allen stand in a very different position than do police officers and other governmental agents. Moreover, the Court is not convinced that the government knew or should have known of the existence—or contents—of the fifteen boxes of files. Since Allen supplied the government with a few additional records after March 15, 2004, the government could have reasonably concluded that it had received all of Allen's files.

"Suppression" under *Brady* denotes either actual or constructive possession by the government. *See, e.g., United States v. LaRouche Campaign*, 695 F. Supp. 1290, 1295 (D. Mass. 1988). Evidence is not "suppressed" when it is readily available to the defendant from other sources. *United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994). Graham had the same access to the Allen files as did the government. If there was a suppression in this case, it was Allen's

doing, not that of the government, and *Brady* does not extend to his activity.

b. Is the evidence favorable and/or material?

Since there was no suppression by the government, Graham cannot establish a *Brady* violation even if the evidence is material. The Court must, nonetheless, discuss materiality, since Graham has also invoked Rule 33, which gives district courts discretion to grant a new trial "if the interest of justice so requires." *Brady's* materiality standard is slightly more relaxed than that imposed by Rule 33. If Graham cannot establish materiality in the *Brady* sense, he cannot establish materiality for purposes of Rule 33.

The superseding indictment charged Defendants with conspiracy to subscribe false tax returns and to commit mail fraud, in violation of 18 U.S.C. § 371; conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); money laundering, in violation of 18 U.S.C. § 1957; and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1). To prove Graham's taxable income, the government relied on the "cash method" of proof, which is an indirect method. The government had the burden of proving a likely source of taxable income. *See, e.g., United States v. Bencs*, 28 F.3d 555, 563 (6th Cir. 1994).

At the hearing in February 2005, the government asserted that it had no duty to disprove all potential sources of nontaxable income. Graham responded that "[t]he law requires [the government] to negate the other source in order to make their likely source likely." Contrary to Graham's assertion, the government was not required to negate or disprove all possible sources of nontaxable income. *See id.* ("Proof

of a source of taxable income carries with it the negation of untaxable income."). *See also United States v. Massei*, 355 U.S. 595, 595 (1958), and Edward J. Smith, *Methods of Computing Taxable Income*, 15 Mertens Law of Fed. Income Tax'n § 55B:49 (explaining that, under the cash method of proof, the government must demonstrate a likely source for unreported income *or* negate all reasonably possible nontaxable sources).

Graham's two-pronged defense was that he had accumulated substantial amounts of cash prior to the years charged in the indictment (cash hoard), and he had loaned money to Allen in the past. The alleged kickbacks, then, were simply repayments by Allen. At the time of trial, Graham did not have documents to substantiate his defense. He argues now that the evidence contained in the newly discovered Allen files would have substantiated his defense without the need for his testimony or that of his ex-wife.

i. The evidence presented by the government at trial.

The government met its burden of proving that Graham had a likely source of taxable income. Indeed, the documentary and testimonial evidence presented by the government on all counts charged in the superseding indictment was overwhelming.

Allen testified that, in 1990, Graham approached him about a venture involving commissions from the sale of equipment to Thyssen. He and Dresbach had already spoken to Robert Murdock. Murdock would not agree to pay commissions in cash but insisted upon getting an invoice; thus, Graham and Dresbach needed Allen to form an entity to send invoices to Hurricane Machine. Allen created T.H.A.T.S. and

approximately a dozen other entities, most of which were shell entities, to send invoices to Hurricane for fictitious consulting services.

Allen also testified that he did not report any of the Hurricane funds on Defendants' tax returns. The plan was that he would report the money on his own returns. However, most of the money went unreported. For more than ten years, he submitted phony invoices to Hurricane on behalf of entities which never performed any services for Hurricane.

Allen further testified as to a very intricate scheme of receiving and distributing the Hurricane proceeds among the three co-conspirators. He stated that Defendants did not want the money to be deposited into their accounts. Thus, he wrote checks to whomever Defendants wanted the money to be paid. He testified that he had an arrangement with the Grahams whereby he would write "re: loan" on the captions of several of the checks he wrote on the Grahams' behalf. The loans, he stated, never existed. From 1994 until 2000, he made $1,077,959.92 in expenditures on Graham's behalf.

Faye Murdock, the wife of Robert Murdock and bookkeeper for Hurricane for more than three decades, testified that Hurricane received consulting fees from Chicago Slitter and Ranez even though Hurricane had no accounts for such fees. She had no knowledge of Hurricane having received any consulting services.

Additionally, there was testimony by Thyssen's equipment sellers that they placed a markup on proposed equipment prices or that they paid higher commissions to Hurricane Machine for sales involving Thyssen than for sales not involving Thyssen. For

example, Richard Schwab, a former sales representative for Ranez Equipment Sales, Inc., testified that a crane which would have cost Thyssen $1 million actually cost $1,507,142 after a thirty percent mark-up at Robert Murdock's behest. Witnesses testified that Graham and Dresbach were the ultimate decisionmakers on the purchase of cranes and slitting machines. Witnesses also testified that inflated equipment invoices, as well as checks from Thyssen, were placed in the United States mails.

The government also presented testimony to the effect that Graham was heavily involved in the construction aspects of Thyssen. Leonard Tajer, a retired plant manager and inside salesperson for Thyssen, testified that Graham once told him to re-quote a $5,000 bid which he thought was too high. Walter Oehler, Thyssen's CFO, testified that, for several phases of Thyssen's expansion project, Graham exceeded the budget allowed by the parent company. Nicholas Tolerico, President of Thyssen-Krupp Steel Services in South Carolina, testified that Graham once ordered him to pay for a machine which was not working. He also testified that Graham had directed him to correspond with Murdock through him; he could not contact Murdock directly.

Numerous witnesses testified as to Graham's cash expenditures and the fact that Allen often wrote checks on Graham's behalf. Michael Zukowski, Thyssen's chef/bookkeeper at Britt Lodge in Jackson Hole, Wyoming, testified that Graham kept unspecified amounts of cash at the lodge. Brandon Stears, a landscaper, testified that Graham paid her $75,000 in cash for a $500,000 landscaping project at Britt Lodge in 1998. The cash was bundled in $5,000 increments comprised of $100 bills. Michael Stears,

husband of Brandon Stears, likewise testified that Graham paid him $75,000 in $5,000 bundles. He was told not to say anything about the cash. Thomas Stoner, a building contractor who worked on Britt Lodge in 1998, testified that he, too, was paid in $5,000 cash bundles and that Graham told him never to tell that he was paid in cash.

Roy Wissel, the owner of Wissel Construction in Vero Beach, testified that, when he built the Grahams' $3 million residence, he received checks from both Allen and Graham. Graham also paid approximately $50,000 in cash, using $5,000 bundles, just as he used to pay other contractors. Wissel also testified that, after the Internal Revenue Service began its investigation, Graham advised him to keep quiet about the cash.

IRS Special Agent Michael Kaza testified that, in July 1999, he interviewed Thyssen's construction contractor—who had been selected solely by Graham —in his home. The contractor took Kaza into his basement and showed him a safe containing thirty-seven white, letter-sized envelopes, each containing $5,000 bundles of cash in $100 bills. Prior to the interview, Kaza had obtained the contractor's bank records, which indicated substantial cash withdrawals in 1997 and 1998. The withdrawals exceeded the amount of money spent by Graham in those years.

Paul Burns, proprietor of Evola Music, testified that Britt Marie Graham purchased three pianos from him in 1996. One of the pianos was a restored Steinway, which cost $33,900. Britt Marie told Burns the piano was for a client named Jerry Allen. Allen wrote the check. Francine McGuire, former president of Chelsea Antiques, Ltd., testified that she made out

an invoice to Allen for antiques ordered by Britt Marie Graham.

Norine Graham, who was called as a rebuttal witness, testified that, during her twenty-year marriage to Graham, which ended in 1987, she had no knowledge of there being a safe in the couples' main residence. Nor did she have knowledge of Graham having brought large amounts of cash from Germany. Graham had previously testified, *inter alia*, that, in the 1980s, he brought approximately $650,000 in cash from Germany to the United States and kept it in safes at one of his three homes.

ii. What Graham argues the new evidence could have proven (or, could have prevented the government from arguing).

Graham first argues that the evidence contained in the Allen files, specifically, records from Commerzbank of Duesseldorf, Germany, would have bolstered his cash hoard defense by showing that he was paid substantial amounts of money (nearly $600,000) in Germany in the late 1970s and 1980s. The money, Graham asserts, earned eighteen percent interest. The records could have been used to confront Annette Skiba, Thyssen's Chief Accounting Officer, who testified that Thyssen did not pay any money to Graham in Germany.

The government responds that, absent evidence that Graham withdrew the money and brought it back to the States, the money in the German accounts is irrelevant. In reply, Graham cites an October 18, 1979, note by Allen, supposedly acknowledging that Graham withdrew $200,000 from a Commerzbank account to use in the United States. While the note, which is not fully legible, appears to

show that $200,000 was withdrawn from a Commerzbank account, it is not clear that the funds were transferred to an account in the States, or that they were in fact brought to the States.

Graham also cites records which, he asserts, show that he received money from the sale of furniture and personalty in the 1980s and 1990s. The government responds that there is no evidence that Graham actually converted these assets to cash. Although the records ostensibly indicate the value of furniture and personalty in Graham's possession in the 1980s and 1990s, there is no record of any sale having taken place or proceeds from a sale having been deposited in the bank. Thus, the Court is not persuaded that these documents, or the Commerzbank records, would have independently established a cash hoard defense.

Graham also argues that the Commerzbank records would have allowed him to impeach the testimony of Agent Kaza. Kaza testified about the cash method of proof with respect to the tax counts. His testimony, combined with numerous checks and flow charts, helped the government show the movement of the Hurricane proceeds through Allen's shell entities to Graham, Allen, and Dresbach. Kaza explained that the IRS considered twenty-five potential sources of cash for Graham. Among those sources was cash brought into the United States from another country. The IRS concluded that outside cash was not a likely source, since there were no Currency Monetary Instrument Reports to substantiate that likelihood. This Court is of the opinion that the Commerzbank records would have had little, if any, impeachment value, since there is no evidence that Graham actually brought the cash into the United States.

Next, Graham argues that the evidence contained in the Allen files could have substantiated his defense that he loaned money to Allen. He first cites a handwritten ledger, dated 1987, which shows a payment of $50,000 to Allen, along with the words, "Repayment of loan." The government points out that the entry shows that Graham was repaying money loaned by Allen, not vice versa. This Court is of the opinion that the ledger entry is ambiguous and would not necessarily have substantiated Graham's defense of loans to Allen.

Graham also cites four unsigned promissory notes which Allen executed in favor of Britt Marie Graham in the early 1990s. The notes total $200,000. Additionally, there is a handwritten note which shows that Allen paid money to Britt Marie Graham "for deal." Mrs. Graham testified that she did not loan any money to Allen. (Of course, Graham argues that she would not have testified if the promissory notes had been available.) The notes were submitted into evidence. Allen was recalled by Graham to testify about the notes, and, during cross-examination by the government, he stated that the notes were merely a ruse. Thus, the jury had the opportunity to consider the notes as impeachment evidence. Apparently, the jury was not persuaded that the notes were probative in the sense argued by Graham.

Next, Graham asserts the new evidence would have allowed him to impeach Allen's testimony regarding a 1996 financial statement which listed accounts receivable due to the Grahams. The specific evidence to which he refers includes 1994 and 1988 financial statements from two institutions, showing accounts receivable from various sources in the

amounts of $75,000, $4,000, and $90,000. The government theorized that the line-item on the 1996 financial statement was false and intended to provide Graham with security to collect kickbacks owed to him by Allen in the event of Allen's death. Graham asserts that the 1994 and 1988 financial statements would have refuted the government's contention that the inclusion of the receivables on financial statements was for the reason argued by the government.

The government responds that this evidence is cumulative and irrelevant. It is cumulative because a 1993 financial statement, with similar entries, was admitted into evidence. It is irrelevant because the amounts reflected are *de minimus* in comparison to the $1 million given to Graham by Allen.

A related argument is that the new evidence contains financial statements and credit applications which were signed in blank by the Grahams. Graham testified that he gave the blank forms to Allen, who typed in the relevant information. The government attacked that assertion as false. The conclusion which this Court is asked to reach is that Allen, by filling in the blank forms, acted alone, rather than in concert with Graham and Dresbach, in carrying out the scheme.

The government responds that the blank credit applications would not have impeached Allen, because his testimony was that he prepared financial statements reflecting notes receivable to protect Graham in the event he died with Graham's Hurricane proceeds in his possession. This Court is of the opinion that the impact of the 1994 and 1988 bank records, and the forms signed in blank, if any, would have been minimal. That Graham signed the

forms in blank does not automatically give rise to an inference that he was ignorant of the forms' content.

Finally, there are other documents which, Graham asserts, would have substantiated his defense without the need for his testimony:

> Allen's 1980 notes reflecting Graham's instructions to liquidate investment holdings and transfer money to Graham.
>
> 1979 files from EF Hutton showing $250,000 in deposits from 1975 through 1979 and $92,000 in withdrawals.
>
> A January 17, 1992, Comerica Mortgage on Graham's Scenic Oaks residence, in the amount of $150,000.
>
> Documents showing $631,000 in proceeds from the sale of Florida property.
>
> A July 10, 1974, Manufacturer's Bank CD purchase receipt for $530,000.
>
> A November 25, 1974, First National City Bank Settlement Statement showing Graham's receipt of $412,681 from Nedco, Inc.
>
> A November 18, 1974, receipt for $502,833 from related shares from Nederlander.
>
> Allen's October 18, 1979 handwritten notes showing knowledge of an account in Graham's name at Commerzbank exceeding $200,000, and noting that Graham was making withdrawals from the account.
>
> A handwritten draft letter to Dr. Kriwet of Thyssen in Germany, supposedly supporting Graham's claim that he had a 10% stake in

profits and that he received payment of such as compensation in Germany.

A 1987 loan from Comerica Bank for $150,000, supposedly used to pay $100,000 to Norine Graham.

A May 18, 1998, acknowledgment receipt and release relating to $290,000, which was paid to Graham from an insurer after a fire at his Martel residence.

A sale contract for Graham's Lost Tree home establishing a sale of personal property.

Letters explaining that some of the furnishings sold were to be retained and reimbursing the proceeds.

September 21, 1986, handwritten notes reflecting proposals on the sale of the Lost Tree residence as a cash transaction.

An August 31, 1981, Detroit Bank and Trust Statement showing a balance of more than $143,000, after $140,000 in cash withdrawals over two months.

Handwritten tabular analysis ostensibly listing Graham's assets and liabilities, showing Allen as an asset and amounts of $70,000 and $50,000.

A letter to an insurance company signed by Allen in 1993, confirming coverage of Johns Island condominium contents of $100,000.

1996 notes by Allen regarding the sale of the Johns Island condominium and showing a furniture value of $175,000.

1994 Merrill Lynch deposit records showing a $500,000 deposit to the account of Britt Marie Graham.

In addition to the arguments set forth above, Graham argues that the government would not have been able to cross examine him in a "mocking and sarcastic tone;" nor would the government have been able to tell the jury that Graham's cash hoard defense was a "fantastic story."

In this Court's view, the deficiencies in Graham's reliance on this evidence are that (1) some of the items, for example, the ledger which purportedly evidences loans made to Allen by Graham, are too uncertain to have substantiated Graham's defense without the need for his testimony; and (2) he has no evidence of cash transfers. While the government has cited no authority requiring Graham to show a literal stockpile of cash, a cash hoard typically consists of an accumulation of cash which is not kept in a bank. *See, e.g.*, Edward J. Smith, *Methods of Computing Taxable Income*, 15 Mertens Law of Fed. Income Tax'n § 55B:49. *cf. Thomas v. Commissioner of Internal Revenue*, 223 F.2d 83 (6th Cir. 1955) (cash hoard found in safety deposit box on the death of a taxpayer). It seems axiomatic that, if such hoard existed, Graham would, at the least, have evidence of cash transfers, even if he had no evidence of a literal cash pile. The relevant inquiry under *Brady* is whether, in the absence of the evidence discovered in the Allen files, he received a fair trial. This Court's confidence in the fairness of the trial and in the verdict rendered by the jury has not been undermined by the newly discovered evidence. Therefore, the Court concludes that Graham is not entitled to a new trial under *Brady*.

2. Entitlement to New Trial Under Rule 33

Rule 33(a) of the Federal Rules of Criminal Procedure provides that a court "may vacate any judgment and grant a new trial if the interest of justice so requires." Such motions are often based on newly discovered evidence.[4] To obtain a new trial based on newly discovered evidence, a defendant must show that the evidence (a) was discovered after the trial; (b) could not have been discovered earlier with due diligence; (c) is material and not merely cumulative or impeaching; and (d) would likely produce an acquittal. *United States v. Hawkins*, 969 F.2d 169, 175 (6th Cir. 1992).

a. Was the evidence discovered after the trial?

Here, the evidence was discovered prior to the end of trial. However, the Court directed Graham to review the material and, if it included exculpatory evidence, file a motion for new trial after the verdict. Thus, this element is satisfied.

b. Could Graham have discovered the evidence sooner?

On June 29, 2004, the government mailed Graham's attorney a letter pertaining to the March 15, 2004, memorandum of an interview with Allen. Graham's attorney received the letter on July 1, 2004, but the memo was missing. He did not inform the government of the missing enclosure until the eve of trial. Although Graham insists that the burden

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[4] Graham cites section 33(b)(1) of Rule 33 of the Federal Rules of Criminal Procedure. Section 33(b)(1) sets forth the time limit for filing a motion for new trial based on newly discovered evidence. Section 33(a) sets for the grounds for a new trial: when the "interest of justice so requires."

was on the government to produce the Allen files, the Court is not persuaded by Graham's argument that he could not have discovered the files sooner with due diligence.

c. *Is the evidence material and would it have likely produced an acquittal?*

Although Rule 33's materiality standard is distinct from *Brady's*, the Court concludes that, because Graham has not satisfied *Brady's* materiality standard, he cannot satisfy the standard imposed by Rule 33. Therefore, his request for a new trial under this Rule must likewise be denied.

3. The Privilege Against Self-Incrimination

Graham asserts that, if he had known of the existence of the fifteen boxes prior to trial, he would not have surrendered his Fifth Amendment right against self-incrimination by taking the witness stand. For the reasons discussed above, the Court is of the opinion that, even if the Allen files had been known to Graham prior to trial, the records would not have been a sufficient substitute for his testimony. Thus, this argument is unpersuasive.

4. Joinder by Defendant Dresbach

Dresbach argues that, if the fifteen boxes of Allen files had been disclosed to the defense prior to trial, he would have testified. He asserts that he declined to testify because Graham was effectively "skewered" by the prosecution. However, had the evidence been disclosed prior to trial, he could have used it to impeach Allen's testimony in a material way. He further asserts that he could have used the evidence to prove that he was not a party to the conspiracy. The Court agrees with the government that the

evidence contained in the Allen files, which pertained only to Graham, would not have bolstered Dresbach's case. The argument that he passed on the opportunity to testify after witnessing the government's handling of Graham is without merit.

5. The Court's Re-Instructing the Jury

Finally, Graham argues that the Court violated Rule 30(c) of the Federal Rules of Criminal Procedure by issuing the following supplemental instruction after the jury announced that it had reached a verdict:

> If the government fails to prove that an overt act occurred after May 20, 1998, then Mr. Graham and Mr. Dresbach cannot be convicted of the conspiracies charged in Counts 1 and 2, because the statute of limitation has run, and you must find them not guilty. Therefore, before you can return a verdict of guilty on Counts 1 and 2 for either Mr. Graham or Mr. Dresbach, you must unanimously agree that at least one overt act was committed after May 20, 1998.

The following exchange preceded the giving of the instruction:

> [The Government]: Your honor, . . . I think there is an inconsistency between the jury instructions and the verdict form, in that the verdict form asks the jury to list all the overt acts that it fmds; whereas, the instructions say that they only have to find one.
>
> The Court: Well, that's not inconsistent. If they find more than one, as long as they find one, it is from your point of view.

[The Government]: Well, but I mean there's only about a half inch of space after that question. And I was just wondering if that's going to create any appellate issues that maybe the Defendants can waive.

* * *

[The Government]: . . . Let me just for the record state that when I gave my rebuttal argument, I was under the impression, the faulty impression that they only had to find one overt act. And I specifically asked them to find an overt act that went past May 20, 1998. Now, I don't know if that is going to create an issue or not, that the jury instructions say you only need to find one overt act. If they put down an overt act before May 20, 1998, does that mean that their guilty verdicts, if they are guilty verdicts, won't withstand appellate review. That's my question.

The Court: The answer is they won't withstand my review. But there's room for them to put down more than one overt act.

I mean ideally you would have had all of the possible ones listed there and check yes or no, which you've done in a different part of it. But I think there's room to do it and—

[The Government]: Well, my main concern is that you have not instructed them that if they do not find an overt act past May 20, 1998, that their verdict, if it is guilty, will not withstand your review.

The Court: What's the Defense view on this?

[Graham's Attorney]: Well, it's not my client, but I think there is a jury instruction that talks about that very issue.

* * *

[Dresbach's Attorney]: I just feel that if we put—if we revise this, which—everybody agreed to it. If we revise this, it will put a super amount of emphasis on it. And it just says specify which overt acts that—maybe if you want—if you would tell them, you know, if you have to write on the back, feel free, if there is not enough room.

[The Government]: Well, I am asking for a short reinstruction to this jury, that although we have only asked them to find one, they have to find all of them. And they have to write down all of them that is in the indictment if you want. Otherwise, it will prejudice the Government.

* * *

[Graham's Attorney]: Your Honor, I probably have not stated my position clearly. And I'd like to.

My position is that I don't believe there is any ambiguity, and I believe that the jury verdict form as it presently exists is appropriate and should be continued in its current form.

And I would also add that I believe Your Honor provided a copy of the indictment to the jury. I think you did. And if you did, all of the overt acts are listed. So, they don't need an addendum or list or anything. They can look at the indictment.

The Court announced a recess and directed the government to prepare a proposed instruction. Following the recess, the discussion continued—

The Court: Okay. The first case is one that I almost mentioned before lunch. And it has to do with—well, the name of the case is Reynolds versus Green [184 F.3d 589 (6th Cir. 1999)]. And it has to do with a situation where the jury comes back and asks a question, and the trial judge does what I call the American [in] Europe rule. And that is he insists upon repeating the same wrong instruction because both parties had agreed to it. And the Sixth Circuit said that was plain error. When the jurors ask a question and say they are confused, you don't just say it louder and slower, expecting them not to be confused.

How does this apply here?

[Dresbach's Attorney]: Well, Your Honor, the jury has not stated—

The Court: They haven't asked anything.

[Dresbach's Attorney]: Exactly. So, therefore there's a—

The Court: Okay. You don't want me to do anything then.

[Dresbach's Attorney]: Yeah, I don't want you to do anything.

The Court: Okay. The other case is called Wilson versus United States, a Supreme Court case . . . . What's your view on that case first [government]?

[The Government]: It is the dicta. And it says that if there is an erroneous legal instruction, that if it's curable without prejudice and without inefficiency, that it should be cured, even after the instructions have been given to the jury.

The government presented the proposed instruction, and Defendants objected on the grounds that, because the jury had already received instruction, the supplemental instruction would cause confusion and, therefore, prejudice; and the jury had not indicated that it was confused. Additionally, Defendant Dresbach argued that reinstruction would violate the double jeopardy clause by giving the jury the opportunity to change its verdict.

The Court continued:

> [I] do note the difference in the facts between the first case you cited, the Reynolds case. But I don't read that as barring, but, rather, encouraging the jury to have a correct statement of the law before they reach their verdict.

The Court concluded:

> All right. I've made my decision, and for the reasons that I have stated to [Graham's attorney], that there's two possibilities that I mentioned, which were if it is an acquittal, this isn't going to hurt you, and if it's not an acquittal, it gives you another chance. And the third possibility that [Graham's attorney] mentioned . . . which was, as I understand it, that it may be a signal to the jury to redo everything, I don't think that's going to happen. I think this is a very focused sixth line instruction.

The jury re-entered, and the Court gave the proposed instruction, asking the jury to continue its deliberations. Twenty-seven minutes later, the jury announced that it had reached a verdict.

Rule 30(c) states that a court "may instruct the jury before or after the arguments are completed, or

at both times." Graham argues that it was prejudicial to give a re-instruction to a jury which had already reached a verdict and had not indicated that it was confused or deadlocked. The instruction, he insists, "unfairly and prejudicially emphasized to the jury that they had better find an over[t] act had occurred after May 20, 1998, or else the defendants would go free."

The Court disagrees. The instruction simply cautioned the jury that it must not convict unless it found an overt act. *Cf. United States v. Desimone*, 119 F.3d 217, 227 (2d Cir. 1997) (upholding instruction on reasonable doubt given after the verdict). Graham has presented no evidence that the re-instruction caused the jury to change its verdict or consider acts outside of the relevant time period. Thus, the Court will not grant a new trial on this basis.

B. Defendant Dresbach's Motion for New Trial

In his motion, Dresbach urges the Court to conduct a hearing pursuant to *Remmer v. United States*, 347 U.S. 227 (1954), to determine which exhibits actually went into the jury room. His theory is that unauthorized exhibits were submitted to the jury. *Remmer* hearings are generally conducted when a defendant can show that unauthorized juror contact "created actual juror bias." *United States v. Yang*, 281 F.3d 534, 549 (6th Cir. 2002). Dresbach raised this issue shortly after the trial, and, at that time, he had no idea which extraneous exhibits might have gone before the jury. Having had the opportunity to question several of the jurors at the time of the motion hearing—which took place more than six months after the trial—he could make no offer of proof as to whether or which unauthorized exhibits

were submitted to the jury. Thus, the Court declines to conduct the requested hearing.

Dresbach next argues that he is entitled to a new trial based on the absence of his trial attorney during a critical stage of the proceedings. The critical stage, he asserts, was the point at which the previously admitted exhibits were being discussed. He did not raise this argument in his initial brief. Rather, he raised it in a supplemental brief after the hearing. He concedes that he has no authority to support this proposition.

The Sixth Circuit has stated:

> Where the Sixth Amendment claim is the denial, rather than the ineffective assistance, of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a matter of law, and prejudice is presumed.

Green v. Am, 809 F.2d 1257, 1263 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), *after remand*, 839 F.2d 300 (6th Cir. 1988). The crucial inquiry, then, is whether Dresbach's attorney was indeed absent during a "critical" stage of the trial.

The Sixth Circuit has stated that the return of a supplemental jury instruction is a critical stage of a criminal proceeding. *French v. Jones*, 282 F.3d 893, 898 (6th Cir. 2002), *vacated on other grounds by Jones v. French*, 535 U.S. 1109 (2002), *after remand, French v. Jones*, 332 F.3d 430 (6th Cir. 2003) (citing *Rogers v. United States*, 422 U.S. 35 (1975); *Shields v. United States*, 273 U.S. 583 (1927); and *Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997)). In *Green*, the

Court held that the absence of counsel during the taking of evidence on the defendant's guilt was prejudicial *per se,* warranting the circumvention of harmless error analysis. *Green*, 809 F.2d at 1263. The Court proposed several circumstances under which harmless error analysis might apply to attorney absence: preliminary hearings, jury deliberations, and return of the verdict. *Id* The discussion of trial exhibits which have already been admitted is a ministerial function which this Court equates to preliminary hearings and the return of the verdict, rather than the giving of a supplemental jury instruction or the taking of evidence of a defendant's guilt. The critical stage is the time at which the exhibits are introduced. The Court concludes that Dresbach has not suffered prejudice *per se*; nor has he demonstrated actual prejudice as a result of extraneous matters having been submitted to the jury. Accordingly, the Court denies Dresbach's motion for new trial.

IV. CONCLUSION

Defendant Graham is not entitled to a new trial under *Brady* or Rule 33. Nor is he entitled to relief based on the Court's re-instructing the jury, since there is no indication that the subsequent instruction impacted the verdict. Defendant Dresbach is not entitled to a *Remmer* hearing, since he has not made an offer of proof as to whether (or which) unauthorized exhibits were submitted to the jury. Dresbach is not entitled to a new trial because he was not denied counsel during a critical stage of the trial proceedings. Therefore, Defendants' motions for new trial are hereby DENIED.

IT IS SO ORDERED.

/s/Arthur J. Tarnow
ARTHUR J. TARNOW
United States District Judge

Dated: June 8, 2005

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed SEP 18, 2007]

No. 05-2332

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH J. GRAHAM,
Defendant-Appellant.

ORDER

BEFORE: BATCHELDER, GILMAN, and ROGERS, *Circuit Judges*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

Nos. 07-826 and 07-850

In the Supreme Court of the United States

KENNETH J. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

KYLE DRESBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a prosecutor's duty to disclose exculpatory evidence extends to materials within the exclusive control of a cooperating co-conspirator who is not acting on behalf of the government.

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In the Supreme Court of the United States

No. 07-826

KENNETH J. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 07-850

KYLE DRESBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 484 F.3d 413.* The order of the district court denying petitioners' motion for a new trial (Pet. App. 23a-52a) is unreported.

* Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 07-826.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. A petition for rehearing was denied on September 18, 2007 (Pet. App. 53a). The petition for a writ of certiorari in No. 07-826 was filed on December 17, 2007. The petition for a writ of certiorari in No. 07-850 was not filed until December 18, 2007, and is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of one count of conspiracy to commit mail fraud and to subscribe false tax returns, in violation of 18 U.S.C. 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and two counts each of money laundering, in violation of 18 U.S.C. 1957, and subscribing a false income tax return, in violation of 26 U.S.C. 7206(1). C.A. App. 72-73, 80-81. Petitioner Graham was sentenced to 75 months of imprisonment, and petitioner Dresbach was sentenced to 58 months of imprisonment. *Id.* at 74, 82. The court of appeals affirmed. Pet. App. 1a-22a.

1. Graham was the chief executive officer of Thyssen, Inc. (Thyssen), a steel-processing company headquartered in Detroit, Michigan. Pet. App. 3a. Dresbach was Thyssen's executive vice president. *Ibid.* Between 1991 and 2001, petitioners conspired to defraud Thyssen of $6.5 million in a kickback scheme by which they caused the company to buy equipment at inflated prices, funneled the proceeds of their scheme through an equipment broker, and then routed the money through ac-

counts set up and maintained by co-conspirator Jerome Allen, an accountant and attorney who had represented petitioners. *Ibid.*; see *id.* at 31a-35a.

2. Before petitioners were indicted, Allen agreed to cooperate with the government as part of a plea agreement. Pet. App. 4a. Once Graham was indicted, his attorney requested that Allen produce all of Graham's files and records. *Ibid.* Allen's attorney delivered five boxes, which, he said, contained all of the files and records in Allen's possession that related to Graham. *Ibid.* That representation was not accurate, and the inaccuracy surfaced when prosecutors interviewed Allen in preparation for petitioners' trial. According to the notes of one of the prosecutors, during that interview, Allen informed the prosecution team that he had certain files relating to Graham that had not been turned over to Graham's attorney. *Ibid.*

After the interview, the government sent a letter to Graham's counsel, erroneously indicating that copies of the prosecutor's interview notes were enclosed. Pet. App. 4a-5a. The day before trial was scheduled to begin, Graham's counsel informed the government that its letter had omitted the notes of the Allen interviews. *Id.* at 5a. That day, the government provided counsel with copies of the notes, and the district court granted a two-day adjournment to allow counsel to review them. *Ibid.* On the first day after the adjournment, Graham moved for dismissal of the charges, alleging prosecutorial misconduct in Allen's retention of old files relating to petitioner. *Ibid.* The district court denied the motion to dismiss, and the trial started that day. *Ibid.*

During the trial, the government learned that Allen still had copies of Graham's old tax returns. C.A. App. 2364. When Allen's attorney delivered the returns, he

also produced copies of four promissory notes that purportedly documented loans Allen supposedly had received from Graham's wife in the early 1990s. *Id.* at 2365-2366. The government reported the disclosure to Graham's counsel, and Allen ultimately produced 15 boxes of files relating to Graham. Pet. App. 28a. Graham moved for a mistrial, which the district court denied. *Ibid.*

3. The jury returned a verdict of guilty on all counts, and petitioners moved for a new trial, arguing that the government had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose exculpatory evidence. The district court denied the motions. Pet. App. 23a-52a. The court concluded that *Brady* does not extend "to evidence which is in the exclusive control of a cooperating witness and of which the government's knowledge is not certain." *Id.* at 29a. The court explained that it was "not convinced that the government knew or should have known of the existence—or contents—of the fifteen boxes of files." *Ibid.* Indeed, the court noted, "Graham had the same access to the Allen files as did the government." *Ibid.* The court also found that the evidence in the files was not material to Graham's defense: "[t]his Court's confidence in the fairness of the trial and in the verdict rendered by the jury has not been undermined by the newly discovered evidence." *Id.* at 41a. Finally, the court determined that Dresbach's *Brady* claim lacked merit because "the evidence contained in the Allen files, which pertained only to Graham, would not have bolstered Dresbach's case." *Id.* at 43a-44a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that petitioners had "not shown any withholding of evidence within the control of the Govern-

ment." *Id.* at 7a. "*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." *Ibid.* (quoting *United States* v. *Beaver*, 524 F.2d 963, 966 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976)). Here, the court found it "undisputed that the evidence was in the personal control of Allen until he disclosed it to all parties late in the trial." *Ibid.* The court also reasoned that the government did not exercise control over Allen merely because he was a cooperating witness: "While cooperating with the Government pursuant to the terms of his plea agreement, Allen remained an independent actor." *Id.* at 8a.

Judge Batchelder dissented. Pet. App. 19a-22a. In her view, the government "was fully aware * * * that Allen had more of Graham's files," *id.* at 20a, and the government should have sought to examine those files, because a "prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case," *ibid.* (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995)).

ARGUMENT

Petitioners contend that a prosecutor has an obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to seek out exculpatory evidence in the possession of an independent, non-governmental witness who has entered into a cooperation agreement with the government. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Graham contends (Pet. 19-22) that the court of appeals contravened this Court's precedents governing

the scope of a prosecutor's duty to discover and disclose information favorable to the defense. That is incorrect. To assert a successful claim under *Brady*, Graham had to establish (1) that the evidence at issue was favorable to him; (2) that it was suppressed by the prosecution; and (3) that he suffered prejudice as a result. See *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). The district court noted that suppression under *Brady* requires either actual or constructive possession by the government, and it concluded that "[i]f there was a suppression in this case, it was Allen's doing, not that of the government, and *Brady* does not extend to his activity." Pet. App. 29a-30a. The court of appeals agreed, ruling that "the record here does not support Graham's contention that Allen was in effect a government agent." *Id.* at 8a.

Graham interprets (Pet. 20-22) the decision of the court of appeals as limiting to law-enforcement personnel this Court's statement in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), that prosecutors have a duty to learn of exculpatory evidence possessed by "others acting on the government's behalf in the case." *Id.* at 437. But the court of appeals did not so limit *Kyles*. Instead, it determined that "[e]ven if the scope of the prosecutor's liability in theory could extend to a cooperating witness if that witness were sufficiently identified with the prosecution team (a question that we do not reach in this case), the record does not support Graham's contention that Allen was in effect a government agent." Pet. App. 8a. In other words, rather than limiting the category of "others acting on the government's behalf," the court simply concluded, based on the evidence in this case, that Allen was not acting on behalf of the government.

The fact-bound determination of the court of appeals does not warrant this Court's review, but in any event, it is fully supported by the record. Pet. App. 8a-9a. The prosecutors did not have unrestricted access either to Allen or to his files; rather, he was "an independent actor," at arm's length with the government. *Id.* at 8a. Even though Allen was testifying at trial pursuant to a cooperation agreement with the government, the prosecutors had to obtain approval from Allen's attorney before interviewing him and had to serve a subpoena on him in order to review his files. *Id.* at 8a-9a. And even after receiving such subpoenas, Allen declined to produce materials that he considered to be covered by the attorney-client privilege. *Id.* at 9a.

Moreover, the prosecutors were not privy to discussions between Allen's and Graham's counsel over the demand that Allen produce all files relating to Graham. C.A. App. 2677. Indeed, Graham worked to prevent disclosure of the Allen files: on various occasions during the proceedings, he accused the prosecutors of invading the attorney-client privilege in connection with their review of documents from the files. *Id.* at 1177. And while Graham received copies of all documents that Allen turned over to the government, he also received additional records from Allen that were not provided to the government. *Id.* at 2400-2401.

Although Allen had contractual obligations under his plea agreement, those duties did not place him in the position of a subordinate with respect to the prosecutors. In fulfilling his obligations as a cooperating witness, he was not acting on the government's behalf for purposes of *Brady*. He did not engage in undercover operations or serve as a confidential informant. Rather, he simply provided testimony under a plea agreement.

Thus, under these circumstances, the prosecutors cannot reasonably be said to have possessed authority or control over Allen. The court of appeals was therefore correct to hold that the prosecutors were not required to discover the records in Allen's custody. Graham does not allege that any other court of appeals would have reached a different result on these facts.

Graham contends (Pet. 20) that the government issued a "directive" to Allen that before any records were turned over to the defense, the prosecution had to review them first. As the court of appeals explained, however, while the government apparently desired to review old files that Allen might turn over to Graham, the record "does not show * * * that the Government actually had possession of the fifteen boxes at issue here," and "[i]t was not until Allen produced the fifteen boxes during trial that either party had any knowledge of their contents." Pet. App. 9a.

Graham also asserts (Pet. 21) that Allen functioned as a "government agent-without-portfolio," who "was covertly providing information to the prosecution about his client Mr. Graham" while cooperating in the criminal investigation. The characterization is not accurate. As the court of appeals observed, "there is no evidence in the record that Allen did anything other than review the Government's evidence of the kickback scheme and agree to plead guilty and cooperate." Pet. App. 9a-10a.

2. Graham also contends (Pet. 23-26) that the decision below contravenes this Court's decisions establishing the right of the defense to rely on representations by the prosecutor that all *Brady* material has been disclosed. According to Graham (Pet. 23), the government falsely represented "that Allen had produced all the documents he possessed and that, in turn, [the government]

had nothing the defense did not have." Graham offers no support for that assertion, and in fact, the government told Graham and the court that it had *not* seen all of Allen's files: "Now, after the indictment, we later learned that Mr. Allen returned all of his files that related to Mr. Graham back to [Graham's counsel]. He didn't show them to us. * * * As far as we know, your Honor, [Allen's client files relating to Graham] were all turned over by Mr. Allen to Mr. Graham prior to our review. * * * I'm sorry, we never reviewed them." C.A. App. 1173-1174. That statement put Graham on notice that the government had not seen Allen's client files and had only limited knowledge of their contents.

Graham knew far more than the government about the extent of the legal and financial services he had received from Allen. In the court of appeals, Graham admitted that he "had long contended that Allen possessed all of his historical banking, legal and tax records." Graham C.A. Br. 53. Graham was Allen's client, and given the duration and extent of their professional relationship, Graham must have known that the five boxes of files that Allen produced before trial covered only a fraction of Allen's legal representation of him.

It is well settled that a defendant cannot sustain his burden of establishing suppression by the prosecution if, in the exercise of ordinary diligence, he himself could have acquired the evidence in question. See, *e.g.*, *United States* v. *Corrado*, 227 F.3d 528, 538 (6th Cir. 2000); *Hoke* v. *Netherland*, 92 F.3d 1350, 1355 (4th Cir.), cert. denied, 519 U.S. 1048 (1996). Here, the record establishes that petitioner's counsel elected not to subpoena Allen for "any and all records or anything like that." C.A. App. 2402. Instead, counsel merely asked Allen's attorney to turn over his files relating to petitioner, and

he assumed that the five boxes he received constituted "everything," *id.* at 2417, 2420-2421, even though the receipt that he signed upon delivery of the boxes did not represent that those boxes included everything, *id.* at 2416-2417.

The district court remarked repeatedly that Graham's counsel had demonstrated a lack of diligence in failing to subpoena Allen before trial for any and all records in his possession relating to Graham. C.A. App. 2420-2421, 2439-2440. The court observed that the 15 Allen boxes on which Graham now bases his *Brady* claim were produced in response to a mid-trial subpoena, and the court noted that the same subpoena could have been issued at least a year earlier. *Ibid.* The court concluded that Graham's complaints of late disclosure were rooted in "defense preparation rather than prosecution misconduct." *Id.* at 2439. In denying Graham's motion for a new trial, the court remarked that it was "not persuaded by Graham's argument that he could not have discovered the files sooner with due diligence." Pet. App. 42a-43a. Graham's lack of diligence defeats his claim under *Brady*.

3. Even if the issues raised in Graham's petition otherwise warranted review, this case would be a poor vehicle for considering them because the judgment of the court of appeals could be affirmed on the alternative ground that the evidence in Allen's files was not material. Although the court of appeals had no occasion to reach the issue, Pet. App. 10a, the district court conducted a detailed review of the allegedly exculpatory evidence, and it concluded that the exclusion of that evidence did not undermine confidence in the fairness of the trial and the jury verdict, *id.* at 30a-41a. Graham has not shown that the court's finding was erroneous,

nor would that case-specific question warrant review in any event.

4. Dresbach's petition should be denied on the ground that it is untimely. The court of appeals denied rehearing on September 18, 2007. 07-850 Pet. 1. Under Rule 13.1 of this Court, a petition for a writ of certiorari had to be filed within 90 days of that date, that is, by Monday, December 17, 2007. Dresbach's petition was not filed until December 18. Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case, see *Schacht* v. *United States*, 398 U.S. 58 (1970), petitioner's only explanation for the untimeliness is that "counsel miscalculated the date on which [the petition] was due." 07-850 Pet. 1 n.1. Accordingly, this Court should decline to exercise its discretion to review the petition. Cf. *Schacht*, 398 U.S. at 65 (excusing delay where petitioner filed a motion and affidavits showing that he "had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control").

In all events, Dresbach's claim lacks merit. Dresbach's argument rests (07-850 Pet. 6-7) entirely on Graham's *Brady* claim. But Dresbach has no basis to join in that claim, because he cannot demonstrate any connection to the allegedly suppressed evidence. As the district court explained, "the evidence contained in the Allen files, which pertained only to Graham, would not have bolstered Dresbach's case." Pet. App. 43a-44a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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